IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re KEITH RANIERE,
Petitioner.

On Petition from the United States District Court
For the Eastern District of New York
Case No. 1:18-cr-00204-NGG-VMS
(Hon. Nicholas Garaufis)

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Dated: December 9, 2022

Joseph M. Tully, Esq.
CA SBN 201187
TULLY & WEISS ATTORNEYS AT LAW
713 Main Street
Martinez, CA 94553
Phone: (925) 229-9700
Fax: (925) 231-7754

Counsel for Petitioner

PETITIONER REQUESTS ORAL ARGUMENT

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual who therefore has no parent corporation or stockholders.

Dated: December 9, 2022,

/s/ Joseph M. Tully
Joseph M. Tully, Esq.
TULLY & WEISS ATTORNEYS AT LAW

Counsel for the Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF JURISDICTION

This petition arises out of the extensive criminal prosecution of the Petitioner in the United States District Court for the Eastern District of New York. This Court has jurisdiction to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651.

RELIEF SOUGHT

Petitioner seeks a Writ of Mandamus instructing the District Court to grant Petitioner's motion for recusal and any such other relief as this Court deems appropriate.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

During a series of proceedings, the district court displayed personal distaste for the Petitioner and his counsel to such an alarming degree that no ordinary observer could conclude that the court's conduct satisfies justice, or the appearance thereof. The district court judge, Hon. Nicholas G. Garaufis, declined to rule on Petitioner's motion that he recuse himself pending the conclusion of an appeal before this Court that was handed down only recently.

However, this case is complicated by the fact that there is a Rule 33 motion for a new trial pending before the district court, which, like the motion to recuse, was stayed pending the outcome of the appeal before this Court. Importantly, ***precedent conflicts on whether the district court has discretion as to which matter it should rule on first, the recusal or the Rule 33 motion***. This conflict in precedent provides impetus for the Second Circuit Court itself to issue instructions now that in this case—and in cases like it—a motion for recusal should be considered a threshold issue that must be decided before a ruling should be made on a Rule 33 motion.

STATEMENT OF THE CASE

The full basis of the motion for recusal is best laid out in the appended Memorandum of Law in Support of Keith Raniere's Motion for Judge Nicholas G. Garaufis to Disqualify Himself Pursuant to 28 U.S.C. § 445. For the Court's ease, we present here a brief summary:

I. Facts Underlying Recusal

A. The Jury Trial

During the jury trial, Judge Garaufis repeatedly acted in ways that would lead a rational person to understand that he has a deep-seated bias against Petitioner, tipping the scale of the trial in favor of the government. For example, Judge Garaufis completely cut off cross-examination of the government's star witness, Lauren Salzman, before inviting further direct examination from the government. His order to cease cross-examination was absolutely damaging to Mr. Raniere's case: though Ms. Salzman was called as a government witness, she also had valuable exculpatory evidence that Mr. Raniere should have been allowed to elicit. Additionally, the Court's attitude toward Mr. Raniere's counsel during trial was demeaning and bullying, communicating to the jury that the Judge Garaufis had made up his mind about the case[1].

B. The Restitution Hearing

Judge Garaufis' behavior at the restitution hearing was as aggressive as it was bizarre. As reported by news media, at one point in the proceedings Judge Garaufis spent *thirty minutes* in a strange and aggressive staring contest with Mr. Raniere's counsel.[2]

This incredibly odd interaction came after a very tense series of exchanges. The restitution hearing was the first appearance of Mr. Raniere's counsel Jeffrey Lichtman and Marc Fernich. At the restitution hearing, it was established that co-defendant Clare

[1] USA v. Raniere et al, 1:18-cr-00204-NGG-VMS-1, Dkt. 1170-72, appended hereto as Exhibit A.
[2] *See* Dan Adler, NXIVM Leader Keith Raniere Ordered to Pay More than $3.4 Million to 21 Victims, Vanity Fair, https://www.vanityfair.com/style/2017/07/nxivm-keith-raniere-restitution-order (July 21, 2021).

Bronfman was paying for Mr. Raniere's attorney fees, that Mr. Lichtman and Mr. Fernich were new to the case, and that they had spoken to Mr. Raniere on the phone once, for about one hour, to briefly summarize the government's stance on restitution but had been unable to see him before the hearing to go over the government's submissions. Over several exchanges, Judge Garaufis berated Mr. Fernich for having requested a delay in proceedings by letter to give him time to come to Court reasonably prepared—whereas Judge Garaufis, for reasons clear only to him, believed counsel should have specifically stated that more time was needed to visit the client.

At a certain point, Judge Garaufis then began berating Mr. Fernich for asking for a one-hour delay in the proceedings so that he could attend the funeral and shiva of a close friend and colleague.

C. The Sentencing Hearing

Judge Garaufis' personal animosity toward Mr. Raniere was also displayed in his sentencing of his co-defendants.[3] Judge Garaufis imposed on Clare Bronfman a sentence of 81 months: *three times* the maximum sentencing range provided by the United States Sentencing

---

[3] *USA v. Raniere et al*, 1:18-cr-00204-NGG-VMS-1, Dkt. 936 at 7, 21, 22 appended hereto as Exhibit B.

Guidelines, and *two years longer* than even what the prosecution themselves had requested. The reason for this extreme departure, as stated by Judge Garaufis himself, was the fact that Ms. Bronfman remained close with Mr. Raniere. Judge Garaufis wrote, "Ms. Bronfman's allegiance to Raniere shines through again and again. She has paid his legal fees and, to this day, maintains that he 'greatly changed her life for the better.'" Judge Garaufis sentenced Ms. Bronfman not based on the crimes she pled guilty to, but based on his personal animosity toward Mr. Raniere.

II. Facts Underlying the Rule 33 Motion

The facts underlying the Rule 33 motion are best explained in that motion, which is appended[4]. For the Court's benefit, however, we present a summary here:

In its prosecution of Keith Raniere, the child pornography at issue was manufactured and planted on a computer hard drive. The government then falsified, fabricated, and manipulated all the key evidence, including key FBI personnel testimony, to convict Mr. Raniere

[4] Due to the voluminous nature of petitioner's pending Rule 33 pleadings, counsel respectfully incorporates them by reference as if appended herein, as plead and found at *USA v. Raniere et al*, 1:18-cr-00204-NGG-VMS-1, Dkt. 1168-69; 1176; and 1178.

of the most heinous crimes he was charged with, possession of child pornography and sexual exploitation of a child. Such extensive government tampering renders the critical pieces of evidence used to convict him of these charges incompetent, unreliable, and invalid. The government's conduct here not only shatters rights inherent in the concept of ordered liberty, but it also shocks the conscience.

Evidence of this tampering was provided by Dr. J. Richard Kiper, Ph.D., a retired FBI Special Agent of 20 years who served as a case agent, a supervisor, a computer forensic examiner, a Unit Chief of the FBI Academy in Quantico, a whistleblower who was lauded by the United States Senate, and who was the "raison d'etre" of the FBI Whistleblower Protection Enhancement Act of 2016. Dr. Kiper concludes, "My analysis demonstrates that some of these alterations definitely took place while the devices were in the custody of the FBI. Therefore, in the absence of any other plausible explanation it is my expert opinion that the FBI must have been involved in this evidence tampering." Two additional experts reviewed the evidence and concluded that electronic evidence in Mr. Raniere's trial was extensively manipulated while in FBI custody and that it was falsified to fit the government's narrative of criminal conduct.

REASONS FOR GRANTING THE WRIT

Relevant Legal Standards

A. Recusal

Judicial disqualification is governed by 28 U.S.C. § 455, which provides in relevant part that a judge or justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The disqualification statute "is concerned largely with ensuring the federal judiciary appears to be impartial, in addition to actually being impartial." *United States v. Sypolt*, 346 F.3d 838, 840 (8th Cir. 2003) [cleaned up]. As this Court has ruled, the test of § 455 "deals exclusively with appearances. Its purpose is the protection of the public's confidence in the impartiality of the judiciary." *United States v. Amico*, 486 F.3d 764, 775 (2d Cir. 2007). The central focus is on whether the allegations of bias "when coupled with the judge's rulings on and conduct regarding them, would lead the public reasonably to believe that these problems affected the manner in which he presided . . . in other words, '[w]ould a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned? Or, phrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done different absent disqualification?" *Id*. at 775 [cleaned up].

Disqualification under Sections 455, subsections (a) and (b)(1) are subject to the *extrajudicial source factor*, or the standard that "personal bias or prejudice" must come from an "extrajudicial source" rather than from judicial rulings alone. *Liteky v. United States*, 510 U.S. 540, 541 (1994) (citing *United States v. Grinnell Corp.* 384 U.S. 563, 583). It is essential to clarify that "the presence of such a source does not necessarily establish bias, and its absence does not necessarily preclude bias." *Id.* at 541. While a ruling alone seldom constitutes a valid basis for bias or partiality disqualification motions, such rulings require disqualification when they evidence such deep-seated favoritism or antagonism as would make fair judgment impossible. *Id*. Further, opinions formed by the judge on the basis of facts introduced or events occurring during current or prior proceedings can provide grounds for a disqualification motion if they also display favoritism or antagonism that would make fair judgment impossible. *Id.* Nonetheless, as the Nation's High Court has opined, "what matters is not the reality of bias or prejudice, but its appearance. Quite simply and quite universally, disqualification is required whenever "impartiality might reasonably be questioned." *Id.* at 548. As noted by the Second Circuit, "The goal of section 455(a) is to avoid not only partiality but also the appearance of partiality. The section does so by establishing an "objective standard 'designed to promote public confidence in the impartiality of the judicial process.'" The rule functions as a critical internal check to ensure the just operation of the judiciary." *Ligon v. City of N.Y.,* 736 F.3d 118, 123 (2d Cir. 2013), vacated in part by *Ligon v. City of N.Y.,* 743 F.3d 362 (2d Cir. 2014). The inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (referencing *Liteky*, 510 U.S. at 548; citing *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1309 (2d Cir. 1988).)

Further, disqualification under § 455(a) is "necessarily fact-driven," and the analysis thereof is guided "not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008).

Additionally, "[I]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of disqualification." *Ligon*, 736 F.3d at 124 [internal citations omitted].

B. Mandamus

"Traditional" mandamus requires three elements be met: (1) "the party seeking issuance of the writ must have no other adequate means to attain the relief [it] desires," (2) "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances," and (3) the petitioner must demonstrate that the "right to issuance is clear and undisputable." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004).

However, in the alternative, the Court is empowered to offer guidance to district courts "when the question is of sufficient importance and there is a dearth of guidance on the issue." *In re Zyprexa Products Liability Litigation*, 594 F.3d 113, 125 (2010) (Kaplan, J., concurring).

I. The requirements of traditional mandamus have been met.

If this Court does not grant this petition for a writ of mandamus, Mr. Raniere will be forced to wait until such time Judge Garaufis rules to discover in which order he rules on the motions. Due to the conflict in case precedent, it is a distinct possibility that the Rule 33 motion can be unfairly swept under the rug before the Recusal issues can be satisfied to comport with basic and fundamental fairness as well as Constitutional Due Process. This would result in not only prejudice but also a loss of judicial economy as the tangled mess of having an unlawful, improper, and unfair ruling on a Rule 33 motion for a new trial prior to hearing the Recusal motion would take much time and attention to address *ex post facto*. The demonstrable evidence of FBI perjury and evidence tampering in Mr. Raniere's trial is provable to a scientific certainty, a standard higher than even proof beyond a reasonable doubt, and Mr. Raniere only seeks to have his day in court to establish such.

As best detailed in the filed memorandum of law in support of the motion to disqualify, Mr. Raniere has demonstrated a clear and undisputable right to have any further proceedings presided over by an impartial judge, a role that Judge Garaufis either cannot perform or cannot appear to perform. Accordingly, the Court should grant a writ of mandamus directing Judge Garaufis to disqualify himself because Mr. Raniere has demonstrated that he has no other adequate means of relief, because he has a clear and indisputable right to the disqualification, and because a granting of the writ is appropriate under the circumstances.

II. Even if the Court denies the petition for a writ of mandamus, it should issue an advisory mandamus opinion to clarify the proper sequencing of rulings on petitions for recusal.

The Supreme Court "departed in some degree" from the traditional mandamus standards and considered the use of advisory writs in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), and this Court has used advisory writs on several occasions when denying a writ of mandamus when the question is of sufficient importance and there is a dearth of guidance on the issue. *In re Zyprexa Products Liability Litigation*, 594 F.3d 113, 125 (2010) (citing *In re International Business Machines Corp.*, 687 F.2d 591 (2d Cir. 1982); *United States v. Amante*, 418 F.3d 220 (2005); *Kaufman v. Edelstein*, 539 F.2d 811 (1976)).

A. The question of when a district court should rule on a petition for recusal is an important question deserving of this Court's advisory mandamus power.

The question of the sequencing of opinions on motions for disqualification when there are also other substantive motions *sub judice* is one that will surely recur in the many cases, of which the instant proceedings are but one example, where a party requests a new trial or appeals and the case may be remanded while at the same time moving to have a judge disqualify themselves. Making a clear sequencing rule will aid judges in giving them clear instructions, will aid movants in decreasing the likelihood that important substantive motions will be ruled on by judges later forced to disqualify themselves through appellate proceedings, and will aid the entire judiciary by reducing the instances of duplicative proceedings.

Parties who discover only through the course of a trial that the judge assigned to their case is so biased as to create the appearance of impartiality face a terrible double bind. On the one hand, they are required to raise objections and request recusal at the earliest possible moment. On the other, the request for recusal is often necessarily tantamount to an accusation that the judge is not performing or cannot perform their jobs correctly. While good judges do their best to rule on motions for disqualifications dispassionately, it is doubtful that a judge who actually *is* biased is likely to admit it. So they will continue to preside over proceedings in which their original bias against one party is now *exacerbated* by the fact that the party has requested recusal and publicly accused them. Movants should know that if the issue of disqualification comes up, raising an objection at the earliest practicable moment as required will not increase the likelihood their proceedings will not be unnecessarily affected by a judge saving the ruling on the recusal motion for the last second, with the effect of essentially wasted the time available to the party to appeal for interlocutory or final appeal.

B. There is a dearth of guidance on this issue.

Precedent handed down by this Court has not fully articulated how and when district courts should consider the sequence in which rulings should be made when a motion for recusal, if granted, would remove a judge from further participation in a proceeding.

In *Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77 (2d Cir. 1996), this Court held that a judge did not err in deciding a preliminary injunction before effecting his recusal.

Yet even district courts seem to recognize that the permissive ruling of *Pashaian* should surely be the exception and not the rule. For example, in a recent § 1983 case brought by an incarcerated pro se plaintiff against his jailers, the judge held that the "recusal issue is a threshold issue that must be resolved before the Court may consider any substantive motion." *Barnes v. Harling*, 368 F.Supp.3d 573, 591 (W.D.N.Y. 2019).

CONCLUSION

For the reasons set forth above, the Court should issue a writ of mandamus directing the trial judge to recuse himself from the case and for the case to be assigned to a new judge. In the alternative, the Court should issue a denial that nonetheless clarifies that motions for recusal should be ruled upon as a threshold matter before substantive issues are decided.

Dated: December 9, 2022

Respectfully submitted,
Keith Raniere,
Petitioner

/s/ Joseph M. Tully
Joseph M. Tully, Esq.
TULLY & WEISS ATTORNEYS AT LAW
Counsel for the Petitioner

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. R. 21(d)(1) because, excluding the portions exempted by Fed. R. App. R. 21(a)(2)(C) this brief contains 3588 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: December 9, 2022

/s/ Joseph M. Tully
Joseph M. Tully, Esq.
TULLY & WEISS ATTORNEYS AT LAW
Counsel for the Petitioner

CERTIFICATE OF SERVICE

I certify that on December 9, 2022, this petition and the accompanying addendum were filed electronically with the Clerk of the Second Circuit Court of Appeals through the Court's electronic filing system, which will accomplish service on counsel for all parties.

Dated: December 9, 2022

/s/ Joseph M. Tully
Joseph M. Tully, Esq.
TULLY & WEISS ATTORNEYS AT LAW
Counsel for the Petitioner

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

In Re KEITH RANIERE,
Petitioner.

On Petition from the United States District Court
For the Eastern District of New York
Case No. 1:18-cr-00204-NGG-VMS
(Hon. Nicholas Garaufis)

EXHIBIT A IN SUPPORT OF

**PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

Dated: December 9, 2022

Joseph M. Tully, Esq.
CA SBN 201187
TULLY & WEISS ATTORNEYS AT LAW
713 Main Street
Martinez, CA 94553
Phone: (925) 229-9700
Fax: (925) 231-7754

Counsel for Petitioner

PETITIONER REQUESTS ORAL ARGUMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA - v. – KEITH RANIERE, Defendant.	Case No. 1:18-cr-00204-NGG-VMS **NOTICE OF MOTION FOR JUDICIAL DISQUALIFICATION** **ORAL ARGUMENT REQUESTED** Submitted on May 5, 2022

PLEASE TAKE NOTICE that Mr. Keith Raniere, by and through his undersigned counsel, Joseph M. Tully, will move pursuant to 28 U.S.C. § 445 that Judge Nicolas G. Garaufis, United States District Judge for the Eastern District of New York, disqualify himself from any further proceedings in this case (1) because his impartiality may reasonably be questioned and (2) because Mr. Raniere's Fifth and Fourteenth Amendment rights to a fair trial before an unbiased, impartial tribunal have not been waived.

Dated: May 5, 2022
Martinez, CA

Respectfully submitted,

/s/Joseph M. Tully

Joseph M. Tully, Esq.
CA SBN 201187
Tully & Weiss Attorneys at Law
713 Main Street
Martinez, CA 94553
Phone: (925) 229-9700
Fax: (925) 231-7754

TO: AUSA Tanya Haajjar
United States Attorney's Office
Eastern District of New York
271-A Cadman Plaza E.
Brooklyn, NY 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	Case No. 1:18-cr-00204-NGG-VMS
- v. –	**ORAL ARGUMENT REQUESTED**
KEITH RANIERE,	Submitted on May 5, 2022
Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF KEITH RANIERE'S MOTION FOR JUDGE NICHOLAS G. GARAUFIS TO DISQUALIFY HIMSELF PURSUANT TO 28 U.S.C. § 445

Dated: May 5, 2022

Joseph M. Tully, Esq.
CA SBN 201187
Tully & Weiss Attorneys at Law
713 Main Street
Martinez, CA 94553
Phone: (925) 229-9700
Fax: (925) 231-7754

Attorneys for Defendant Keith Raniere

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

TRANSCRIPTS

PRELIMINARY STATEMENT

"[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955). Mr. Keith Raniere moves this Court to disqualify itself from all further proceedings in Case Number 1:18-cr-00204-NGG-VMS because the Court's statements, rulings, and conduct during past proceedings from the outset of the case, through trial and sentencing, did not meet the Supreme Court's standard of impartiality and deprived Mr. Raniere of the fair trial by an impartial tribunal to which he was entitled as a matter of Due Process. *See id* at 135.

"Pursuant to the Fifth and Fourteenth Amendments, it is axiomatic that all criminal trials must be conducted within the bounds of fundamental fairness. *Gayle v. Scully*, 779 F.2d 802, 805 (2d Cir. 1985) (Citing *Taylor v. Hayes*, 418 U.S. 488, 501-02 (1974); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *Rochin v. California*, 342 U.S. 165, 173 (1952); *Tumey v. Ohio*, 273 U.S. 510 (1927).) Under the Due Process Clause, there is a well-developed right, established in a long line of cases, to a trial before an unbiased judge." *Daye v. Attorney General of New York* 696 F.2d 186, 196 (2d Cir. 1982). The Court's disqualification is particularly important now because newly discovered evidence —the details of which are outlined in a motion filed contemporaneously herewith pursuant to Rule 33 of the Federal Rule of Criminal Procedure — challenges the validity of Mr. Raniere's conviction and necessitates a new trial as a result of newly discovered evidence of governmental malfeasance in the form of criminal acts, including tampering with evidence and committing perjury. *See* Dkt. 1168 and 1169. Given this Court's conduct in past proceedings, a "reasonable person, knowing all the facts contained within the record of Case Number 1:18-cr-00204-NGG-VMS, would question Judge Garaufis' impartiality" *United States v. Yousef*, 327

F.3d 56, 169 (2d Cir. 2003), and his ability to fairly and accurately evaluate the import of the newly discovered evidence on the validity of Mr. Raniere's conviction.

Disqualification is required because only disqualification of Judge Garaufis and evaluation of Mr. Raniere's Rule 33 motion by a truly unbiased judge, both in fact and in appearance, can ensure that Mr. Raniere's guarantees under the Fifth and Fourteenth Amendments, to a trial before an impartial judge, are upheld in this case.

FACTUAL BASIS FOR THE MOTION

This Court presided over Mr. Raniere's trial and sentencing and is aware of the facts underlying the case. This Motion does not seek to re-litigate the facts of Mr. Raniere's conduct or the validity of his conviction. Instead, in highlighting portions of the proceedings before the Court during the trial, at a post-trial hearing, and at sentencing, Mr. Raniere demonstrates that the Court displayed, to an ordinary observer, a lack of judicial temperament and expressed its personal distaste for Mr. Raniere and his counsel such that the Court's conduct neither satisfies justice nor any appearance of justice.

A. THE JURY TRIAL

During the cross-examination of the government's main cooperating witness, Lauren Salzman, by Mr. Raniere's trial counsel, Marc Agnifilo, Judge Garaufis cut off Ms. Salzman's answer, stopped any further cross-examination by Defense counsel, and then solicited further direct from the government. Trial Tr. at 2265: 16. This action by Judge Garaufis was critical as Ms. Salzman was a material witness to both sides. While she testified on behalf of the government, she also could have provided favorable testimony for the Defense, specifically exculpatory information, including her insight and personal experience around the intentions of

DOS and Mr. Raniere at the relevant times. The following exchange indicates that her testimony would have provided such evidence:

Mr. Agnifilo: What was your intention when you were in DOS?

The Court: You may answer.

Ms. Salzman): My intention was to prove to Keith that I was not so far below the ethical standard that he holds that I was -- I don't even know how far below I am. I was trying to prove my self-worth, and salvage this string of a hope of what I thought my relationship might someday be, and I put it above everything else; I put it above my friends, and I put it above other people, helping them in their best interest. That's what I did when I was in DOS.

The Court: Okay, that's it. We are done.

Mr. Agnifilo: Okay, Judge. Thank you.

The Court: You are done.

Mr. Agnifilo: I know. I am done.

The Court: No, I said you're done.

Mr. Agnifilo: I know. I am.

The Court: So you can sit down. Redirect?

Ms. Hajjar: No, Your Honor.

The Court: Nothing?

Ms. Hajjar: No.

The Court: All right, the witness is excused. You may stand down.

(Witness steps down.)

The Court: All right, we are close to five o'clock, members of the jury. We are going to recess for tonight. …

Trial Tr. at 2265:7-2266:8.

Here, Mr. Agnifilo was seeking to introduce exculpatory evidence regarding a lack of the required intent on the part of Mr. Raniere through Ms. Salzman. However, as Ms. Salzman was describing her intentions within DOS, which would refute the government's theory of the alleged racketeering elements of the case as well as the government's contentions about Mr. Raniere's nefarious mens rea, Judge Garaufis abruptly ended not just Mr. Agnifilo's line of questioning, but the rest of his cross-examination entirely. When Mr. Agnifilo replied by thanking him, respectfully acknowledging that the Court was calling a break in testimony, apparently to let the witness collect herself emotionally, Judge Garaufis continued to chastise him in front of the jury with, "You are done." Trial Tr. at 2265:9-19.

Further, when Mr. Agnifilo acquiesced by stating, "I know. I am done," Judge Garaufis continued to bully, "No. I said you're done," and then ordered Mr. Agnifilo to sit down. All of this was done in full view of the jury. Shockingly, the Court then invited the prosecution to attempt to rehabilitate their witness before she was dismissed. Thus, there can be no excuse that Judge Garaufis, by cutting off Mr. Agnifilo, was merely trying to spare the witness or have her collect herself emotionally. Instead, Judge Garaufis immediately solicited further questioning by the government, asking not once but twice if the government wanted to question Ms. Salzman on redirect. *Id*. at 2265:7-2266:8. The contrast in treatment by the Court that the jury observed towards Mr. Agnifilo, clearly demeaning him versus respectfully assisting the prosecution, shows impermissible favoritism and would prompt any reasonable person to question the Court's bias or prejudice towards the Defense.

Moreover, after the jury recessed for the evening, Mr. Agnifilo inquired why Judge Garaufis had cut off his cross-examination.

The Court: Anything else from the Defense?

Mr. Agnifilo: Yes, Your Honor.

The Court: Go ahead.

Mr. Agnifilo: I don’t know why Your Honor cut off my cross-examination.

The Court: If you want to know, you went way over the line as far as I’m concerned with regard to this witness. You could have asked your questions and moved on to the next question, but you kept coming back, and I am not going to have someone have a nervous breakdown on the witness stand in front of -- excuse me, this is not DOS. This is not the allegations. This is a broken person, as far as I can tell. And whether she’s telling the truth, whether the jury believes her, I think it’s absolutely necessary that there be a certain level of consideration for someone’s condition. And that’s really what this was. You had plenty of -- if you had other things to say, you could have gone on and said them. But what I had here was, I had a crisis here. And not in my courtroom. So, you have your record, and if there is a conviction, you can appeal my decision to the Second Circuit, okay?

Mr. Agnifilo: Your Honor, most respectfully – and I am not going to belabor the point -- I think it is an important -- she talked about the change in perspective, she did, and I’m trying to explore that change. I --

The Court: You did, in many different ways. Sir, I have a right and an obligation to control the extent to which something like this is put to a witness, and you had that opportunity. You made your points. It's all there; it's on the record. And if I made a mistake, then you will have your opportunity if you should not be successful in gaining your client's acquittal, and I'm just going to leave it at that. But I'm telling you, I was watching this witness.

Mr. Agnifilo: I'm more concerned, quite frankly, about, I thought I took great pains to be appropriate and even-keeled.

The Court: Well

Mr. Agnifilo: I never raised my voice.

The Court: Look, I am not saying you are not a man you are not a lawyer who maintains his composure. I am not talking about that. I am worried about her composure in this case. I have to sentence this defendant and what you did was, basically, ask her to make legal judgments about whether what she did in pleading guilty was farcical that she took somebody else's advice, some lawyer, so she could get out from under a trial. I thought that really went pretty far beyond the pale, frankly.

Mr. Agnifilo: Your Honor, I --

The Court: I took her guilty plea, sir. All right?

Mr. Agnifilo: I am not trying to argue with you. I am not trying to argue with you.

The Court: Then don't argue with me.

Mr. Agnifilo: No --

The Court: You can take your appeal if you should not be successful. I don't want to talk about it anymore. I thought it was extremely excruciating. When I tried to cut off the line of questioning, you just went right back to the line of questioning. You could have gone on to something else. You could have. ***I may not get everything right up here, but I will tell you, as a human being, it was the right decision. Alright? And before I'm a judge, I'm a human being.*** And that goes for everybody in this room, and it includes you and the government. And I am not going to allow someone to be placed in this circumstance and then let it continue. I am the one who is disappointed. I'm done. 9:30.

Trial Tr. 2267:16 - 2270:11 (emphasis added).

(Judge NICHOLAS G. GARAUFIS exited The Courtroom.)

B. THE RESTITUTION HEARING

On July 20, 2021, a restitution hearing was held in this case. It was the first appearance for counsel Jeffrey Lichtman and Mark Fernich, appearing on behalf of Mr. Raniere. At the restitution hearing, it was established that co-defendant Clare Bronfman was paying for Mr. Raniere's attorney's fees, that Mr. Lichtman and Mr. Fernich were new to the case, and that they had spoken to Mr. Raniere on the phone once, for about one hour to briefly summarize the government's stance on restitution but had been unable to see him before the hearing or go over the government's submissions. Judge Garaufis afforded Mr. Lichtman and Mr. Fernich a brief recess of five to ten minutes to speak with Mr. Raniere, who appeared via video conference.

After that recess, Attorney Fernich indicated the possibility that, after the hearing, he may want to reconvene with Mr. Raniere, perhaps in person, "[M]aybe we better get out there if it depends on factual things that are beyond my grasp that maybe Mr. Raniere can elucidate." Restitution Hearing Tr. 18: 21-24.

This statement resulted in the below exchange.

The Court:	Mr. Fernich, I'm not conducting a maybe possibly it's okay, but maybe it's not okay for the judge to issue a decision. That's not how judges work, sir. And this judge certainly doesn't work that way. You took this on. You're being paid by Ms. Bronfman.
Mr. Fernich:	Unfortunately, Judge --
The Court:	Let me finish. And I don't want to be interrupted by any lawyer in this courtroom. When you took on this retainer, you knew what your job was, and you could have gone and seen the client and talked to the client, and reviewed the submission of the government's with the client. And I'm not going to waste my time waiting for you to decide whether what I'm doing is adequate to meet your obligations. It ain't gonna happen.
Mr. Fernich:	May I respond?
The Court:	No. I'm not finished.
Mr. Fernich:	Okay.

The Court: No one has ever asked me to issue – to say, "If you issue a decision, I'm going to stop you and tell you I want something else. I want to go see my client." That's not how it works. You know it's not how it works. What is your answer to that?

Mr. Fernich: Well, my answer, your Honor, is twofold: It's not like going to the MDC or the MCC. We did, of course, attempt to get cleared for visiting in the designation facility, and we were not able to accomplish that with the facility within a week's time.

Restitution Hearing Tr. 19:21 - 20:25.

Then Judge Garaufis asked Mr. Fernich where on the docket was a request for an adjournment to visit Raniere. Mr. Fernich did not have the docket but stated he wrote a letter requesting a week's adjournment because the Defense could not be "reasonably prepared." The Court granted two days and quibbled that the Defense did not specifically ask for time to visit Raniere, leading to the below exchange.

The Court: It's cute by half.

Mr. Fernich: No, sir.

The Court: I have nothing more to say to you on the subject. We're done.

Mr. Fernich: That's fine, your Honor.

Restitution Hearing Tr. 22:3 - 13.

Here, the matter should have been concluded. Judge Garaufis ended further discussion, and Mr. Fernich acquiesced. However, Judge Garaufis' animus and antagonism could not be contained, and he immediately goaded Mr. Fernich into further conflict:

The Court: Is there anything else you want to answer me back about --

Mr. Fernich: Excuse me?

The Court: Every time I say something, you've got something else to say on that subject.

Mr. Fernich: I'm sorry, I'm not following The Court.

The Court: The request was for extra time to make the submission, not to adjourn the proceeding. And you didn't request for time to go see your client in Arizona. That's not what you requested.

Mr. Fernich: Not specifically, sir.

The Court: You're misleading, trying to mislead.

Mr. Fernich: Sir - -.

Restitution Hearing Tr. 22:9 - 23:2.

At this point, Judge Garaufis had brought up multiple times that Mr. Fernich had not requested more time for the hearing even though neither Mr. Fernich, Mr. Lichtman, nor Mr. Raniere were objecting to the court moving forward with the restitution hearing. Judge Garaufis then continued.

The Court: There's nothing else we're going to say about that. You're the same individual who told me you had to go to a funeral today for someone who was not a member of your family, when the funeral was at 11:45 and you could have been here at 2 o'clock, which you were. I'm tired of this. We're not getting off to a good start, Mr. Fernich.

Mr. Fernich: Your Honor --

The Court: Are you going to sit here, counsel, while he does this?

Mr. Lichtman: Judge, I think that we can move past this. You've made the decision, we respect it, and we're ready to hear the decision.

The Court: Does your client have anything else he wants to say before I sentence him with regard to restitution?

Mr. Lichtman: No, your Honor.

The Court: Thank you.

Restitution Hearing Tr. 23:3 - 19.

This exchange demonstrates that Judge Garaufis entered the proceedings only concerned with completing the hearing, a disdain for Ms. Bronfman paying for Mr. Raniere's legal fees, pettily creating conflict with Mr. Raniere's new counsel where none existed, and was personally attacking Mr. Fernich. This is impermissible antagonism that shows personal bias and prejudice.[1], [2]

Judge Garaufis did move on to issuing decisions on restitution. However, after issuing orders regarding restitution amounts, Judge Garaufis again sought conflict and resorted to personal attacks and low blows against Mr. Raniere's Defense team.

The Court: Is there anything else from the government for today?

Ms. Hajjar: Not from the Government. Thank you, your Honor.

The Court: Anything else from the Defense for today?

Mr. Fernich: No, sir.

---

[1] "A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff." Guide to Judiciary Policy, Vol. 2A, Ch. 2, Judicial Canon 3(B)(4) (March 12, 2019).

[2] The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias. *Id*. at Commentary for Canon 3A(3).

	Just so the record is clear, nothing that the Court has said undermines my advice to Mr. Raniere –
The Court:	Excuse me, excuse me.
Mr. Fernich:	Yeah.
The Court:	No speeches. Not in my courtroom.
	If there's nothing else - -

Restitution Hearing Tr. 43:8 - 20.

Here, neither Mr. Fernich nor Mr. Lichtman had objected to moving forward with the restitution hearing. However, Mr. Fernich had also made a record that 1.) he had only spoken with his client, Mr. Raniere, in a privileged capacity once, for one hour, 2.) his client had not seen "any of the submissions" or exhibits that the government had filed," 3.) he had only been able to tell Mr. Raniere "the gist of what's in the government's latest submission," though not any previous submissions, 4.) he had only related "a very cursory overview or summary" of the exhibits, and 5.) that he, himself, was not "fully familiar with the prior batch of exhibits that were submitted." Mr. Fernich was professional and kindly, stating, for the record, that nothing in the court's decision affected the professional advice that he had given to Mr. Raniere prior to the hearing. Mr. Fernich was being thorough in protecting the record. However, Judge Garaufis took Mr. Fernich's being thorough in his position as Mr. Raniere's counsel as an opportunity to attack Mr. Fernich.

Mr. Fernich:	There's absolutely nothing --
The Court:	-- as to the judgment of the Court --
Mr. Fernich:	There is absolutely nothing dilatory about my request -
The Court:	Excuse me.

Mr. Fernich	-- to go to a close --
The Court:	Excuse me.
Mr. Fernich:	-- colleague's and friend's funeral --
The Court:	Excuse me.
Mr. Fernich:	-- who passed --
The Court:	Excuse me.
Mr. Fernich:	-- over the weekend.
The Court:	Excuse me.
Mr. Fernich:	Nothing dilatory about that.
The Court:	Excuse me.
Mr. Fernich:	And I resent the insinuation.
The Court:	***Sir, you can resent anything you want.***
Mr. Fernich:	I do resent it.
The Court:	***You're well compensated for your work by your client -***
Mr. Fernich:	That is absolutely immaterial to the humanity of going to a funeral of an esteemed member of the bar of this court who passed in the middle of the night Sunday, sir. That is human decency and professional courtesy, and you did not afford me it. And I resent it. And you've compounded it by telling me --
The Court:	Excuse me.
Mr. Fernich:	-- I was trying to delay this proceeding?
The Court:	You wanted the day off, sir. You wanted--

Case 1:18-cr-00204-NGG-VMS Document 1172 Filed 05/06/22 Page 17 of 83

Mr. Fernich:	I wanted the day off to go to Joel Winograd's funeral, who died of pancreatic cancer on Sunday morning?
The Court:	***Give him this to go cry on. He's not a member of your family, sir.***
Mr. Fernich:	This demeans you more than --
The Court:	You have an obligation to this Court --
Mr. Fernich:	And I'm here.
The Court:	***Be seated or I'll have you arrested.***
Mr. Fernich:	You have me arrested.
The Court:	Be seated.
Mr. Fernich:	This demeans you more than me.
The Court:	Be seated.
Mr. Fernich:	It's a disgrace. It's a disgrace. It's a lack of human decency.
Mr. Lichtman:	Stop.
Mr. Fernich:	And it's disgraceful. You can stare at me all you want, your Honor.
Mr. Lichtman:	Stop.
Mr. Fernich:	All you want.
The Court:	One final thing I'd like to say. I'm from Queens. And the attorney asked to go to a funeral at 11:45 this morning in Fresh Meadows. He could have gone to the funeral, attended the funeral of his friend, and then come to court at two.
Mr. Fernich:	And interment and then --
The Court:	Excuse me.
Mr. Fernich:	-- Shiva afterwards.

The Court: Excuse me.

Mr. Fernich: It is false. Anyone who knows the traffic around here --

The Court: ***Will you keep quiet?***

Mr. Fernich: No, sir, I will not.

Mr. Lichtman: Stop, stop. Enough.

Mr. Fernich: Not if you slander me in public that way.

The Court: The attorney could have gone to the funeral and come here to court at 2 o'clock. But it would have required me to adjourn this proceeding if I had allowed him to go to the cemetery, which I did not.

Mr. Fernich: I asked for one hour. A one-hour delay is what I asked for. And you know it. And it's a matter of public record.

Mr. Lichtman: Stop.

The Court: I've never seen anything like this.

Mr. Fernich: Nor have I, sir.

The Court: ***I'm not asking you for your comments.***

Mr. Fernich: I know you're not.

Mr. Lichtman: Stop it.

(Pause in proceedings.)

Mr. Lichtman: Judge, may I approach?

The Court: No.

Mr. Lichtman: Okay.

(Pause in proceedings.)

Mr. Fernich: Can we speak privately?

The Court: This is a criminal matter. Everything is on the record.

Mr. Fernich: Okay.

(Pause in proceedings.)

Restitution Hearing Tr. 43:21 - 47:10, emphasis added. [3], [4]

Here, the pause in proceedings was a bizarre approximate thirty minutes of Fernich and Judge Garaufis staring at each other.[5] Despite Judge Garaufis' claimed excuse for failing to adhere to Mr. Raniere's Sixth Amendment right to confront the government's main cooperating witness, Lauren Salzman, during jury trial - that he was a "human being" "before [he was] a "judge" Trial Tr. 2267:16 - 2270:11, it is fair to say that Judge Garaufis' humanity certainly did not prevail over his judicial role in denying Mr. Fernich a one-hour delay in the proceedings so Mr. Fernich could attend a friend and colleague's funeral and shiva. Judge Garaufis even justified his personal attacks against Mr. Fernich because Mr. Fernich was "well compensated" for his work. It is also notable that the Court denied Mr. Fernich's request for a one-hour delay to attend the funeral of a good friend. However, the Court was willing to waste thirty minutes sitting there, on the record, ***doing nothing***.[6] Thus, there can be no excuse that the Court's denial of Mr. Fernich's request had anything to do with a concern for time.

---

[3] "A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff." Guide to Judiciary Policy, Vol. 2A, Ch. 2, Judicial Canon 3(B)(4) (March 12, 2019).

[4] The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias. *Id*. at Commentary for Canon 3A(3).

[5] *See* Dan Adler, NXIVM Leader Keith Raniere Ordered to Pay More than $3.4 Million to 21 Victims, Vanity Fair, https://www.vanityfair.com/style/2021/07/nxivm-keith-raniere-restitution-order (July 21, 2021).

[6] *See Id.*

C. THE SENTENCING HEARING

Ms. Clare Bronfman's sentencing by Judge Garaufis further shows the extent of his personal bias and inability to be fair in this case. The Court imposed a sentence of 81 months, which was three times the maximum sentencing range provided by the United States Sentencing Guidelines for Ms. Bronfman. This sentence was nearly two years longer than even the prosecution had requested and was contradictory to the factual findings made by Judge Garaufis at the hearing. This sentence was imposed on a theory of willful ignorance or willful blindness regarding DOS and Mr. Raniere specifically.

Of specific note was the Courts' focus on how "Ms. Bronfman's allegiance to Raniere shines through again and again. She has paid his legal fees and, to this day, maintains that he 'greatly changed her life for the better.'" SPA. [7] 125:14-17. The Court imposed its improperly excessive sentence, not based on any alleged crimes Ms. Bronfman was convicted of but based on her personal connection to Mr. Raniere. This is even though the Court had found that Ms. Bronfman did not knowingly support any crimes that Mr. Raniere was convicted of and indeed did not even necessarily share in the aims of her co-defendants. Thus, it is not criminal culpability that Judge Garaufis used to sentence Ms. Bronfman, but rather his personal hatred of Mr. Raniere to justify the heightened punishment of Ms. Bronfman.

None of Ms. Bronfman's co-defendants received a prison sentence above the guidelines' range. Ms. Bronfman pled guilty to white-collar crimes. In contrast, Ms. Mack and Ms. Salzman pled to far more serious offenses, including racketeering and racketeering conspiracy, and were found to be central figures in DOS. However, only Ms. Bronfman, who maintained a personal connection to Mr. Raniere, was unfairly treated. The Court admitted as much when it stated that

---

[7] Citations to "SPA" refer to the Special Appendix submitted by Ms. Bronfman in her Principal Appellate Brief identified Dkt. 69.

one of the factors that led the Court to show leniency to Ms. Mack and Ms. Salzman was that, unlike an "***other individual who have remained deferential to Mr. Raniere***," both had turned the page on the part of their lives during which they were devoted to him. SBA[8] 75:2 -76:1 (emphasis added). This is not about cooperating with the prosecution but just the renouncement of Mr. Raniere. This can be seen as Ms. Russell was similarly gently treated for renouncing Mr. Raniere, even though she had not cooperated with the prosecution. SBA[9] 75–77, 117–18.

As evident from the preceding, Judge Garaufis took his extrajudicial views of bias, prejudice, and partiality against Mr. Raniere and applied each as a multiplier to Ms. Bronfman's sentence to give her "three times the high end of the Guidelines range." SPA 131. This is unmistakable evidence of his bias against Mr. Raniere, which necessitates Judge Garaufis' disqualification in this case.

LEGAL AUTHORITY FOR THE MOTION

Pursuant to the Fifth and Fourteenth Amendments, it is axiomatic that all criminal trials must be conducted within the bounds of fundamental fairness. *Gayle v. Scully*, 779 F.2d 802, 805 (2d Cir. 1985) (Citing *Taylor v. Hayes*, 418 U.S. 488, 501-02 (1974); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *Rochin v. California*, 342 U.S. 165, 173 (1952); *Tumey v. Ohio*, 273 U.S. 510 (1927).) Under the Due Process Clause, there is a well-developed right, established in a long line of cases, to a trial before an unbiased judge." *Daye v. Attorney General of New York* (2d Cir. 1982) 696 F.2d 186, 196.

Further, The Due Process Clause "requires a fair trial in a fair tribunal before a judge

[8] Citations to "SBA" refer to the Supplemental Appendix submitted by Ms. Bronfman in her Principle Appellate Brief identified as Dkt. 139.

with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997). As the United States Supreme Court has opined, "A fair trial in a fair tribunal is a basic requirement of due process. ***[F]airness, of course, requires an absence of actual bias in the trial of cases.***" *In re Murchison*, 349 U.S. 133, 136 (1955) (emphasis added). The High court has further opined that "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Proctor v. Warden*, 435 U.S. 559, 560 (1978) (internal citations omitted). As noted by the Court of Appeals for the Second Circuit, "The Supreme Court and Courts of Appeals, including this Court, have emphasized repeatedly ***that not only must justice be done, it also must appear to be done***." *United States v. Edwardo-Franco*, 885 F.2d 1002, 1005 (2d Cir. 1989) (emphasis added).

Moreover, the judicial disqualification statute codified under 28 U.S. Code, section 455, "is concerned largely with ensuring that the federal judiciary appears to be impartial, in addition to actually being impartial." *United States v. Sypolt*, 346 F.3d 838, 840 (8th Cir. 2003) (internal citations omitted). To that end, Section 455, subsection (a) provides in relevant part that a Justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). "[T]his test deals exclusively with appearances. Its purpose is the protection of the public's confidence in the impartiality of the judiciary." *United States v. Amico*, 486 F.3d 764, 775 (2d Cir. 2007). In applying this test, as noted by the Second Circuit, the central focus is on whether the allegations of bias "when coupled with the judge's rulings on and conduct regarding them, would lead the public reasonably to believe that these problems affected the manner in which he presided … in other words, "[w]ould a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned? Or, phrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done absent disqualification?" *United States v. Amico*, 486 F.3d 764, 775 (2d Cir. 2007) (internal citations omitted).

Disqualification under Sections 455, subsections (a) and (b)(1) are subject to the *extrajudicial source factor*, or the standard that "personal bias or prejudice" must come from an "extrajudicial source" rather than from judicial rulings alone. *Liteky v. United States*, 510 U.S. 540, 541 (1994) (citing *United States v. Grinnell Corp.* 384 U.S. 563, 583). It is essential to clarify that "the presence of such a source does not necessarily establish bias, and its absence does not necessarily preclude bias." *Id.* at 541. While a ruling alone seldom constitutes a valid basis for bias or partiality disqualification motions, such rulings require disqualification when they evidence such deep-seated favoritism or antagonism as would make fair judgment impossible. *Id*. Further, opinions formed by the judge on the basis of facts introduced or events occurring during current or prior proceedings can provide grounds for a disqualification motion if they also display favoritism or antagonism that would make fair judgment impossible. *Id.* Nonetheless, as the Nation's High Court has opined, "what matters is not the reality of bias or prejudice, but its appearance. [Q]uite simply and quite universally, disqualification is required whenever "impartiality might reasonably be questioned." *Id*. at 548. As noted by the Second Circuit, "[T]he goal of section 455(a) is to avoid not only partiality but also the appearance of partiality. [T]he section does so by establishing an "objective standard 'designed to promote public confidence in the impartiality of the judicial process.'" The rule functions as a critical internal check to ensure the just operation of the judiciary." *Ligon v. City of N.Y.,* 736 F.3d 118, 123 (2d Cir. 2013), vacated in part by *Ligon v. City of N.Y.,* 743 F.3d 362 (2d Cir. 2014). The inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (referencing *Liteky*, 510 U.S. at 548; citing *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1309 (2d Cir. 1988)).[10]

Further, disqualification under § 455(a) is "necessarily fact-driven," and the analysis thereof is guided "not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008).

Additionally, "[I]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of disqualification." *Ligon*, 736 F.3d at 124 (internal citations omitted)).

ARGUMENT

I. THE JUDICIAL DISQUALIFICATION OF JUDGE GARAUFIS IS MANDATED BEFORE THE HEARING OF MR. RANIERE'S MOTION TO VACATE JUDGMENT AND GRANT A NEW TRIAL PURSUANT TO RULE 33 IN ORDER TO ENSURE THE ADHERENCE TO MR. RANIERE'S CONSTITUTIONAL RIGHT TO A TRIAL BEFORE AN UNBIASED JUDGE AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

At all times during the course of the proceedings, and especially in the instances described with particularity herein, the Court's comments and personal opinions expressed about Mr. Raniere, his Defense team, and his co-defendants, displayed a deep-seated, unequivocal hostility and personal bias against Mr. Raniere and his Defense team, making disqualification for all future proceedings, in this case, warranted and, indeed, mandatory. While many exhibitions of this bias and prejudice were expressed during rulings, the surrounding comments and accompanying opinions clearly show evidence of deep-seated judicial favoritism for the

[10] *See also* Bassett, Judicial Disqualification in the Federal Appellate Courts, 87 Iowa L. Rev. 1213, 1230 (May 2002) (discussing the advisory Code of Conduct for United States judges including Canon 2A ["A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."] and Commentary to Canon 2A ["An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired."]).

government and its witnesses and judicial antagonism towards Mr. Raniere and his Defense team, thus necessitating the disqualification of Judge Garaufis. *See Liteky v. United States,* 510 U.S. 540, 541 (1994).

A. THE JURY TRIAL

During the trial, the Court's discussion with defense counsel as to why the Court had halted the cross-examination of Ms. Salzman was both antagonistic to the Defense and dishonest. When Mr. Agnifilo asked the question that prompted Judge Garaufis to halt all further cross-examination by the Defense of Ms. Salzman, Judge Garaufis had clearly ruled on the legal validity of Mr. Agnifilo's question by telling the witness, "You may answer." To then, minutes later, claim that the reason he halted not only the line of questioning, but the entirety of the rest of the cross-examination, was because Mr. Agnifilo had allegedly repeatedly entered into legally improper territory is nothing other than a blatant misstatement, gaslighting, a lie, or all three.

The truth of the matter, as revealed through the transcripts, is that the Court made personal conclusions about the veracity of Ms. Salzman, the government's main cooperating witness, about DOS, a women's secret society related to NXIVM at issue in the case, and about Mr. Raniere's culpability in regard. These personal views prevailed over a neutral application of the law, precluding the full and fair examination of the witness and the confrontation to which Mr. Raniere was entitled under the Sixth Amendment of the United States Constitution.

The Court's behavior here is analogous to the judge in *Berger v. United States*, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921), whom the Supreme Court found to have been impermissibly biased. *Id*. at 28. In *Berger*, a World War I espionage case involving German American defendants, the judge stated, "One must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty." *Id*. at 28. He followed with, "This defendant is the kind of a man that spreads this kind of propaganda, and it has been spread until it has affected practically all the Germans in this country." *Id*. at 28-29. He also said, "If anybody has said anything worse about the Germans than I have, I would like to know it so I can use it," and "I know a safe blower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years . . . and as between him and this defendant, I prefer the safe blower," *Id*. at 28 and 29. The judge said all of this before trial began. *Id*. at 27.

Judge Garaufis' statement, "I am not going to have someone have a nervous breakdown on the witness stand in front of – excuse me, this is not DOS," demonstrated that the Court's biased belief that DOS was harmful was as clear and indisputable as the *Berger* court's biased beliefs against German Americans.

Judge Garaufis' final remarks on this issue, "I may not get everything right up here, but I will tell you, as a human being, it was the right decision. Alright? And before I'm a judge, I'm a human being," again showed that he applied and believed in his personal views instead of the law.[11] In that statement, the Court admitted to letting extrajudicial emotions, biases, and prejudices come before the rules of evidence or the United States Constitution, the sacrosanct law of our land. In letting extrajudicial emotions, biases, and prejudices come before the rules of evidence or the United States Constitution, the Court violated Mr. Raniere's Fifth and Fourteenth Amendment rights to a fair trial before an unbiased tribunal and his Sixth Amendment right to confront Ms. Salzman. This is precisely the comment and accompanying opinion that relies on extrajudicial sources and shows evidence of deep-seated favoritism for the government's witness

[11] "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Guide to Judiciary Policy, Vol. 2A, Ch. 2, Judicial Canon 2(A) (March 12, 2019).

and antagonism towards Mr. Raniere and his counsel, thus, making fair judgment impossible and necessitating the disqualification of Judge Garaufis. See *Liteky v. United States,* 510 U.S. 540, 541 (1994).

Less extreme measures would have been possible. The Court could have called a break in the proceedings to permit the witness to compose herself or held a sidebar to inquire about the Defense's line of inquiry and its appropriateness. However, the Court instead ended the examination in its entirety, dismissing the witness from the stand, precluding the possibility of any further questioning, and demeaning defense counsel in front of the jury — for asking a question it had permitted. [12], [13]

While a ruling alone would not be sufficient in a motion to disqualify, the fact that Judge Garaufis here declared his reasoning *behind* his ruling to be based on sympathy for a witness which affected him as a human shows that Judge Garaufis will prioritize his humanity, ignore the law, and abandon his judicial ethics, obligations. Accordingly, such conduct necessitates his disqualification in this case.

B. <u>THE RESTITUTION HEARING</u>

During the restitution hearing, the Judge Garaufis displayed an unacceptable bias toward Mr. Raniere's Defense team by letting his frustration with the Defense's request for a delay—essentially because new counsel had not yet been able to adequately meet with Mr. Raniere to go over the materials to be discussed at the hearing, which had been made more difficult due to the COVID-19 pandemic, and because of the unforeseeable and tragic death and funeral of a

---

[12] "A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff." Guide to Judiciary Policy, Vol. 2A, Ch. 2, Judicial Canon 3(B)(4) (March 12, 2019).

[13] The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias. *Id*. at Commentary for Canon 3A(3).

member of the bar of this Court who was a close friend of defense counsel — boil into a personal rant against the Defense's attorneys and an unwarranted, personal attack on their professionalism.

Despite Judge Garaufis' claimed excuses for denying Mr. Raniere his Sixth Amendment right to confront the government's main cooperating witness during the jury trial — that he was a "human being" "before [he was] a "judge" — Judge Garaufis' humanity certainly did not prevail over his judicial role in denying Mr. Fernich a one-hour delay in the proceedings so Mr. Fernich could attend a friend and colleague's funeral. On the contrary, Judge Garaufis justified his personal attacks against Mr. Fernich on the unsubstantiated supposition that Mr. Fernich was "well compensated" for his work, and further implied that counsel could give the decedent "this to go cry on," meaning the exchange between counsel and the court, because the decedent was not a member of Mr. Fernich's family.

Federal courts agree that to prevent any probability of unfairness or appearance of impropriety, the interests of justice would be best served by directing a new judge to hear new claims when the history of the case, combined with evidence of the Judge's expressions of his disapproval toward a party and his attorney may cause a reasonable person to question whether justice was being done. See *Mitchell v. Maynard*, 80 F.3d 1433, 1450 (10th Cir. 1996); *See also Sentis Group v. Shell Oil* 559 F.3d 888, 905 (8th Cir. 2009) (where the district court directed profanities at plaintiffs or plaintiffs' counsel over fifteen times, denied plaintiffs a meaningful opportunity to respond following defendants' lengthy presentation, and cut off plaintiffs counsel's in a sanction hearing and moved for dismissal, the appellate court noted "the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality").

Here, the record, in this case, is evidence that there can be no question that Judge Garaufis failed to display the mandatory judicial temperament that was essential to the equitable adjudication of Mr. Raniere's case. Judge Garaufis' attitude, demeanor, and tenor towards Mr. Raniere and his counsel, as specified herein, indicate that to prevent any probability of unfairness or appearance of impropriety, the interests of justice would be best served by directing a new judge to hear Mr. Raniere's Motion to Vacate his Judgment and Grant a New Trial Pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

C. <u>SENTENCING HEARING</u>

Judge Garaufis' bias towards Mr. Raniere is further demonstrated by his tripling the sentence of Ms. Bronfman, a first-time offender because she refused to "renounce" Mr. Raniere and the NXIVM organization. Despite the court's legal findings that Ms. Bronfman did not knowingly support any of the alleged crimes, Judge Garaufis used his judicial position to punish Ms. Bronfman because of her personal connection to Mr. Raniere. This clearly demonstrates that Judge Garaufis' antagonism toward Mr. Raniere will make fair judgment impossible. *Liteky v. United States,* 510 U.S. 540, 541 (1994). There can be no question here that a reasonable observer, objectively viewing all the facts and circumstances of this case, would question Judge Garaufis' impartiality and would entertain significant doubt that justice would be done. *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (referencing *Liteky*, 510 U.S. at 548; citing *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1309 (2d Cir. 1988)).

II. <u>MR. RANIERE HAS NOT WAIVED HIS CLAIM FOR DISQUALIFICATION OF JUDGE GARAUFIS AS SUCH A WAIVER IS IMPERMISSIBLE UNDER THE CIRCUMSTANCES, AND MR. RANIERE'S CLAIM IS TIMELY.</u>

In relevant part, Section 455 provides that "[N]o justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification." 28 U.S.C. § 455.

Here, the grounds for disqualification of Judge Garaufis arise both under subsection (a) and (b) of Section 455. As such, a waiver of the disqualification of Judge Garaufis is impermissible under the circumstances.

As to the timeliness of Mr. Renerie's claim for disqualification, the Second Circuit has opined that "a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim" *Polizzi v. U.S.*, 926 F.2d 1311, 1321 (2d Cir. 1991). As the case law demonstrates, this timeliness requirement hinges on preventing inefficiency and judge shopping. "[A] defendant cannot take his chances with a judge and then, if he thinks the sentence is too severe, secure a disqualification and a hearing before another judge. *Taylor v. United States*, 179 F.2d 640, 642 (9th Cir. 1950). However, without a "pending action before" a judge or a situation where "petitioners' rights are at issue," a party lacks standing to request disqualification of a judge. *United States v. Sciarra*, 851 F.2d 621, 636 (3d Cir. 1988). Additionally, although a "timeliness" requirement is not found within the text of Section 455, the Second Circuit has, without explication, previously assumed that timeliness is also requisite under Section 455, referencing 28 U.S.C § 144, which in relevant part requires that the affidavit be timely and sufficient and be "filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time" *See In re International Business Machines Corp.,* 618 F.2d 923, 932 fn. 12 (2d Cir. 1980); 28 U.S.C. § 144.

Case 1:18-cr-00204-NGG-VMS Document 1172 Filed 05/06/22 Page 31 of 33 PageID #: 21537

Here, Mr. Renerie's claim to disqualify Judge Garaufis is not made to challenge the previous jury trial. An appeal of the trial is already pending before the appellate court. Instead, this request seeks to have Judge Garaufis disqualified from presiding over any further proceedings in this case. Thus, there can be no assertion made that the timing of this disqualification claim allows Mr. Raniere to see "if the proceedings went his way before using the information to seek disqualification." *Sine v. Local No. 992 Int'l Bhd. Of Teamsters*, 882 F.2d 913, 916 (4th Cir. 1989). Moreover, the first filing to be heard before Judge Garaufis since the behavior outlined in this motion showing personal bias and prejudice has only just been filed. Dkt. 1168 and 1169. As such, this is the first opportunity to disqualify Judge Garaufis from further proceedings. Accordingly, Mr. Renerie's claim to disqualify Judge Garaufis is timely.

CONCLUSION

Here, under both 28 U.S.C. § 455, subsections (a) and (b)(1), disqualification of Judge Garaufis is required. The record, in this case, is replete with instances in which a reasonable individual would undoubtedly question the Court's impartiality and entertain a significant doubt that justice had been done. More importantly, a reasonable individual would also undoubtedly question the Courts' ability to disinterestedly and appropriately evaluate the evidence that the Defense has uncovered and petitioned for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, as discussed in the accompanying motion.

"Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present." *Williams v Pennsylvania*, 579 US 1, 8-9 (2016). The Court need not ask whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U. S. 868, 881 (2009).

By Judge Garaufis' voicing of his personal feelings about the participants in this case — his animus toward Mr. Raniere, his sympathy for Ms. Salzman as a "broken" individual, (though she was not considered a victim by the government and even pleaded guilty to being a racketeering co-conspirator) his anger at Mr. Raniere's defense counsel, and his contempt for Ms. Bronfman due to her refusal to "renounce" Mr. Raniere — showed such clear evidence of personal bias that there can be no question that the proceedings were colored by injustice and that if this Court continues to preside over the case, Mr. Raniere will be denied a fair hearing and the objective tribunal that the Fifth and Fourteenth Amendments guarantee as fundamental rights.

In this case, disqualification and reassignment are the only way to preserve Mr. Raniere's rights, the rule of law, and justice — let alone the appearance of justice. The Court's history of biased comments and rulings, in this case, establishes that Judge Garaufis cannot engage neutrally and impartially moving forward. Only a new judge can fairly adjudicate any further issues in this case without these pre-existing biases and prejudices. Without disqualification, there is no chance that Mr. Raniere will receive a fair hearing on his Rule 33 claim. The undeniable bias and prejudice toward Mr. Raniere and his Defense team were shown, in this case, is evidence that the pending Rule 33 motion cannot proceed justly in front of Judge Garaufis.

Anyone who had entered the courtroom and witnessed Judge Garaufis' outrageous comments during trial, at the restitution hearing, or at sentencing, would have concluded that the judge was biased against Mr. Raniere and his counsel, and that the tribunal before which Mr.

Raniere was tried had neither just nor did it present the appearance of justice. As a result of, Judge Garaufis' expression of bias, prejudice, and partiality against Mr. Raniere has clear extrajudicial motivations. Consequently, his disqualification is necessary and appropriate.

Thus, Mr. Raniere respectfully moves this Court to disqualify itself from any further proceedings in this case.

Dated: May 5, 2022,

Respectfully submitted,

TULLY & WEISS ATTORNEYS AT LAW
/s/ Joseph M. Tully
JOSEPH M. TULLY
Attorney for KEITH RANIERE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. –

KEITH RANIERE,

Defendant.

Case No. 1:18-cr-00204-NGG-VMS

NOTICE OF ERRATA RE MOTION FOR JUDICIAL DISQUALIFICATION

Submitted on May 6, 2022

NOTICE OF ERRATA

On May 6, 2022, Defendant Keith Raniere, by and through his counsel Joseph M. Tully, filed a Motion for the Recusal /Judicial Disqualification of Judge Nicolas G. Garaufis, Pursuant to 28 U.S.C. § 445. Due to an oversite, both the notice of said motion and the memorandum of law in support thereof incorrectly indicate that they were submitted on May 5, 2022. The Defense herby submit corrected copies of the relevant pages of Document 1170, page 21506, and Document 1171, page 21507, attached hereto as Exhibit A and B, respectively, to correct this inadvertent clerical error.

Dated: May 6, 2022
Martinez, CA

Respectfully submitted,

/s/Joseph M. Tully

Joseph M. Tully, Esq.
CA SBN 201187
Tully & Weiss Attorneys at Law
713 Main Street
Martinez, CA 94553
Phone: (925) 229-9700
Fax: (925) 231-7754

TO: AUSA Tanya Haajjar
United States Attorney's Office
Eastern District of New York
271-A Cadman Plaza E.
Brooklyn, NY 1120

EXHIBIT A

Case 22-3-VMS Document 4-2 1172 Filed 05/06/22 0 Page 38 of 5 68

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. –

KEITH RANIERE,

Defendant.

Case No. 1:18-cr-00204-NGG-VMS

NOTICE OF MOTION FOR JUDICIAL DISQUALIFICATION

ORAL ARGUMENT REQUESTED

Submitted on May 6, 2022

PLEASE TAKE NOTICE that Mr. Keith Raniere, by and through his undersigned counsel, Joseph M. Tully, will move pursuant to 28 U.S.C. § 445 that Judge Nicolas G. Garaufis, United States District Judge for the Eastern District of New York, disqualify himself from any further proceedings in this case (1) because his impartiality may reasonably be questioned and (2) because Mr. Raniere's Fifth and Fourteenth Amendment rights to a fair trial before an unbiased, impartial tribunal have not been waived.

Dated: May 5, 2022
Martinez, CA

Respectfully submitted,

/s/Joseph M. Tully

Joseph M. Tully, Esq.
CA SBN 201187
Tully & Weiss Attorneys at Law
713 Main Street
Martinez, CA 94553
Phone: (925) 229-9700
Fax: (925) 231-7754

TO: AUSA Tanya Haajjar
United States Attorney's Office
Eastern District of New York
271-A Cadman Plaza E.
Brooklyn, NY 11201

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA - v. – KEITH RANIERE, Defendant.	Case No. 1:18-cr-00204-NGG-VMS **ORAL ARGUMENT REQUESTED** Submitted on May 6, 2022

MEMORANDUM OF LAW IN SUPPORT OF KEITH RANIERE'S MOTION FOR JUDGE NICHOLAS G. GARAUFIS TO DISQUALIFY HIMSELF PURSUANT TO 28 U.S.C. § 445

Dated: May 5, 2022

Joseph M. Tully, Esq.
CA SBN 201187
Tully & Weiss Attorneys at Law
713 Main Street
Martinez, CA 94553
Phone: (925) 229-9700
Fax: (925) 231-7754

Attorneys for Defendant Keith Raniere

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re KEITH RANIERE,
Petitioner.

On Petition from the United States District Court
For the Eastern District of New York
Case No. 1:18-cr-00204-NGG-VMS
(Hon. Nicholas Garaufis)

EXHIBIT B IN SUPPORT OF

PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Dated: December 9, 2022

Joseph M. Tully, Esq.
CA SBN 201187
TULLY & WEISS ATTORNEYS AT LAW
713 Main Street
Martinez, CA 94553
Phone: (925) 229-9700
Fax: (925) 231-7754

Counsel for Petitioner

PETITIONER REQUESTS ORAL ARGUMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES,

-against-

CLARE BRONFMAN,

Defendant.

SENTENCING MEMORANDUM
18-CR-204 (S-3) (NGG)

NICHOLAS G. GARAUFIS, United States District Judge.

This sentencing statement concerns Defendant Clare Bronfman, who entered a plea of guilty to a superseding information, pursuant to a plea agreement, on April 19, 2019 to one count of Conspiracy to Conceal and Harbor Aliens for Financial Gain, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(i) and one count of Fraudulent Use of Identification, in violation of 18 U.S.C. §§ 1028(a)(7), 1028(b)(1)(D), and 1028(c)(3)(A).

I. CALCULATION OF OFFENSE LEVEL & GUIDELINES RANGE

The Probation Department recommends that I calculate the Total Offense Level for Ms. Bronfman's sentence as 17. (Presentence Investigation Report ("PSR") ¶ 141.) Ms. Bronfman challenges two aspects of the Probation Department's suggested calculation. First, she argues that a three-level increase pursuant to U.S.S.G. § 2L1.1(b)(2)(A) is not warranted because the offense of conviction on Count One did not "involve[] the smuggling, transporting or harboring of six or more unlawful aliens." (*See* Def. Sentencing Mem. ("Def. Mem.") (Dkt. 915) at 26-33.) Second, she argues that a two-level increase pursuant to U.S.S.G. § 3B1.1(c) is not warranted because her role in the offense of conviction on Count One was not as "an organizer, leader, manager, or supervisor in criminal activity." (*See id*. at 36-38.) Ms. Bronfman suggests that the correct Total Offense Level is 16. (*Id*. at 24-25.) The Government agrees with Ms. Bronfman that the two-level enhancement for holding a leadership role is not warranted, but it agrees with the Probation Department that the three-level enhancement for participation in the smuggling of six or more aliens is appropriate. (Gov't Sentencing Mem. ("Gov't Mem.") (Dkt. 922) at 29-31.)

I agree with Ms. Bronfman that the Total Offense Level is 16, for the following reasons.

A. Offense Level on Count One

Under Count One, Ms. Bronfman pleaded guilty to Conspiracy to Conceal and Harbor Illegal Aliens for Financial Gain. U.S.S.G. § 2L1.1(a)(3) provides that the Base Offense Level for this offense of conviction is 12. At issue is whether I should apply either or both of two possible enhancements to the base offense level: a three-level enhancement under U.S.S.G. § 2L1.1(b)(2)(A) or a two-level enhancement under U.S.S.G. § 3B1.1(c).

I decline to apply the three-level enhancement for smuggling or harboring six or more aliens. Ms. Bronfman pleaded guilty to the offense of conviction in Count One based on charged conduct concerning Jane Doe 12. As the Probation Department described in the PSR, evidence presented at the trial of Ms. Bronfman's co-defendant, Keith Raniere, suggested that Ms. Bronfman also participated in conspiracies to conceal and harbor five additional non-citizens. (*See* PSR ¶¶ 21-38.) While the law is clear that the court may consider this evidence in determining a defendant's sentence, s*ee, e.g., United States v. Cacace*, 796 F.3d 176, 191 (2d Cir. 2015)[1], I decline to consider it for the narrow issue of determining whether to apply this particular Offense Level enhancement under the Guidelines. Because the charged conduct to which Ms. Bronfman pleaded encompassed only one victim, Jane Doe 12, I will not apply the enhancement set forth in U.S.S.G. § 2L1.1(b)(2)(A).

I also decline to apply a two-level enhancement under § 3B1.1(c) on the theory that Ms. Bronfman acted in a leadership, management, or

[1] When quoting case law, except as otherwise noted, all citations and internal quotation marks are omitted, and all alterations are adopted.

supervisory role. Section 3B1.1(c) of the Guidelines indicates that this enhancement applies when the defendant was "the organizer, leader, manager, or supervisor of one or more other participants" in the offense of conviction. U.S.S.G. § 3B1.1(c), cmt. n.2. The commentary to the Guidelines specifies that non-citizens who are smuggled, transported, or harbored by the defendant are "not considered participants" for purposes of this enhancement unless they play an active role in the smuggling, transporting, or harboring of additional non-citizens. *See* U.S.S.G § 2L1.2, cmt. n.6. I agree with the Government's characterization of Jane Doe 12 as a victim of the offense of conviction, rather than a co-participant in the offense. (*See* Gov't Mem. at 30-31.) Accordingly, I find that Ms. Bronfman did not have a supervisory role in the commission of this offense, insofar as she did not manage or direct the conduct of other participants in the conspiracy to conceal and harbor Jane Doe 12.

I therefore find that the Adjusted Offense Level on Count One is 12.

B. Offense Level on Count Two

Under Count Two, Ms. Bronfman pleaded guilty to Fraudulent Use of Identification. Ms. Bronfman, the Government, and the Probation Department are all in agreement regarding the calculation of the Offense Level on Count Two, and I agree with their reading of the Guidelines. Subject to U.S.S.G. § 2B1.1(a)(2), the Base Offense Level for this count is 6. An eight-level enhancement applies because the loss amount exceeds $95,000. *See id.* § 2B1.1(b)(1)(E). An additional two-level enhancement applies because a substantial part of the fraudulent scheme was committed from outside the United States. *See id.* § 2B1.1(b)(10)(B).

I therefore find the Adjusted Offense Level for Count Two is 16.

C. Calculation of Total Offense Level

We have two counts of conviction, one with an Adjusted Offense Level of 12 and the other with an Adjusted Offense Level of 16. According to

§ 3D1.4 of the Guidelines, which addresses multiple counts of conviction, I must take the highest Offense Level and increase it by two levels based on the unit calculations under that provision. The highest Adjusted Offense Level is 16, and a two-level increase yields a subtotal of 18. Because Ms. Bronfman pleaded guilty, she is entitled to a two-level reduction for acceptance of responsibility. (*See* § 3E1.1(a).) A two-level reduction from 18 leaves her with a Total Offense Level of 16.

D. Calculation of Guidelines Range

Having determined the Total Offense Level, I will now calculate the Guidelines range. Ms. Bronfman's Criminal History category is I, and her Total Offense Level is 16. Using the Guidelines table, I calculate the applicable Guidelines range as 21 to 27 months in the custody of the Attorney General.

II. SENTENCE

Having calculated the Guidelines range, I now turn to the sentence I will impose. It is well-established law that the Sentencing Guidelines are merely advisory, rather than binding on a district court. *Gall v. United States*, 552 U.S. 38, 46 (2007). Accordingly, Supreme Court and Second Circuit precedent require that I determine an independently "reasonable" sentence based on an "individualized application of the statutory sentencing factors" in 18 U.S.C. § 3553(a). *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010) (citing *Gall*, 552 U.S. at 47). And while, as the Second Circuit has noted, "in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances," *United States v. Betts*, 886 F.3d 198, 201 (2d Cir. 2018), that is not always the case. *See United States v. Wernick*, 691 F.3d 108, 118 (2d Cir. 2012) ("[T[he guideline recommendation is but one factor to be considered in selecting an appropriate sentence . . . and we have frequently emphasized that a sentencing court has discretion to consider a broad range of information bearing on the history and characteristics of the defendant.").

That is particularly true in a case such as this one, where the crimes of conviction, standing alone, do not fully encompass the larger pattern of misdeeds perpetrated by Ms. Bronfman. This case is not about an isolated incident of credit card fraud or a run-of-the mill case of harboring of illegal aliens for financial gain. To the contrary, the crimes to which Ms. Bronfman has pleaded guilty exist in the larger context of the crimes committed by her co-defendants, including Keith Raniere. A brief description of that context is therefore necessary before turning to an analysis of the § 3553(a) factors.

Raniere is the founder of an organization called Nxivm, a self-styled executive coaching and self-help organization that functioned as a pyramid scheme in which members paid thousands of dollars for various "workshops" and new members were recruited via the promise of payments or services for enrolling others into the scheme. (PSR ¶¶ 8-13.) Raniere made members of Nxivm call him "the Vanguard," and he maintained a rotating group of fifteen to twenty female Nxivm members with whom he had sexual relationships. (*Id.*) These women were not permitted to have sexual relationships with anyone but Raniere or to discuss with others their relationship with Raniere. (*Id.*) From at least 2009 to 2018, Ms. Bronfman served on Nxivm's Executive Board. (*Id.* ¶ 16.)

In 2015, Raniere created a secret society called "DOS" or "the Vow." (*Id.* ¶ 14.) As the PSR explains:

> DOS was comprised of all female masters (who were Nxivm members) who recruited and commanded groups of all female slaves. When identifying prospective slaves, masters often targeted women who were experiencing difficulties in their lives, including dissatisfaction with the pace of their advancement in Nxivm. Each DOS slave was expected to recruit slaves of her own, who in turn owed service not only to their masters but also to masters above them in the DOS pyramid. Raniere alone formed the top of the pyramid as the highest master. Other than Raniere, all participants in DOS were women. Raniere's status as head of the

> pyramid was concealed from all newly recruited slaves, other than those directly under Raniere. DOS masters persuaded slaves to join DOS by falsely describing it as a secret women's empowerment group and that the goal of DOS was to eradicate weaknesses in its members. Prospective slaves were required to provide collateral to prevent them from leaving the group or disclosing its existence to others. Collateral included sexually explicit photographs and videos of themselves, rights to financial assets, and videos or letters of (true or untrue) confessions that would be damaging to the prospective slave's family members and friends. After joining DOS, slaves were required to provide additional collateral, including sexually explicit photographs, and to pay tribute to their masters, including by performing tasks that would otherwise be compensable. In addition, several DOS slaves were directed to have sex with Raniere to maintain membership.

(*Id.* ¶ 14.)[2]

DOS operated to abuse and exploit young women for sex, labor, and financial gain. There are too many examples to name; to pick one, when a DOS "slave" developed feelings for another man, Raniere told her parents that she had committed an "ethical breach" and ordered that she be confined to a room in her parents' home without human contact. (PSR ¶ 46.) Many DOS slaves were to be branded with a symbol, which, unbeknownst to the "slaves," represented Raniere's initials; at Raniere's instruction, the DOS victim being branded was held down by other DOS "slaves" and required to state "Master, please brand me, it would be an honor." (PSR ¶¶ 63-75.) Following a six-week jury trial over which I presided, Raniere was convicted of racketeering,

---

[2] As the PSR Addendum notes, Ms. Bronfman objects to paragraph 14 of the PSR because, *inter alia*, the discussion of DOS "creates a false impression that the defendant was aware of or even a participant of DOS." While I will discuss the extent of the Ms. Bronfman's knowledge of DOS in the context of the § 3553(a) factors, I note that Paragraph 14 does not state that Ms. Bronfman was aware of or involved with DOS, or that she directly funded it.

racketeering conspiracy, wire fraud conspiracy, forced labor conspiracy, sex trafficking conspiracy, and two counts of sex trafficking.

To be crystal clear, Ms. Bronfman was not convicted of any of those crimes. Ms. Bronfman was not convicted of participating in any racketeering activity. And there are many aspects of Raniere's crimes with which Ms. Bronfman very well may not have been familiar. Ms. Bronfman vigorously disputes the proposition that she was aware of either DOS or any sex trafficking that Raniere engaged in, and she vigorously disputes the proposition that she knowingly funded DOS or sex trafficking activity. I agree with Ms. Bronfman that the available evidence does not establish that she was aware of DOS prior to June 2017 or that she directly or knowingly funded DOS or other sex trafficking activities.

However, I believe that this background about not only Raniere and Nxivm—in which she held a leadership role—but also DOS—in which there is no evidence that she directly participated—is relevant context for my analysis of the appropriate sentence for Ms. Bronfman. Ms. Bronfman's crimes were not committed in a vacuum. They were committed in connection with her role in Nxivm and her close relationship with Raniere, and I believe that it would be inappropriate for me to consider them divorced from that context.

A. Materials Considered

Before turning to an analysis of the § 3553(a) factors, it is important to say a word about what I will be considering in that analysis. First, I have reviewed the parties' sentencing submissions. (*See* Def. Mem.; Gov't Mem.; Def. Reply (Dkt. 927).) I have read the 67 letters submitted in support of Ms. Bronfman, as well as the many victim letters that have been submitted. I have listened carefully to the victim statements made here today in court. And I have heard and considered counsel's arguments.

I have also considered testimony adduced at Raniere's trial, to the extent it is relevant and has been proven, in my view, by a preponderance of the evidence. It is well-settled that the scope of a sentencing judge's inquiry when analyzing the § 3553(a) factors is "largely unlimited as to the kind of information [the district court] may consider, and it is free to consider evidence of uncharged crimes, dropped counts of an indictment, and criminal activity resulting in an acquittal in determining sentence." *United States v. Bennet*, 839 F.3d 153, 161 n.5 (2d Cir. 2016). I am not bound by the rules of evidence that would pertain at a trial, and I am not limited to considering admissible evidence in determining an appropriate sentence. *See United States v. Chang*, 59 F. App'x 361, 363 (2d Cir. 2003). Particularly relevant here, the Second Circuit has repeatedly held that a sentencing court is entitled to rely on information "gleaned from a trial in which the person to be sentenced was neither a defendant nor represented by counsel." *Cacace*, 796 F.3d at 191; *see also United States v. Tracy*, 12 F.3d 1186, 1203 (2d Cir. 1993).

B. § 3553(a) factors

I now turn to the § 3553(a) factors. Under § 3553(a), I must consider several factors in imposing a sentence, including the nature and circumstances of the offense; the defendant's history and characteristics; the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; the need for the sentence to afford adequate deterrence; and the need to protect the public.

1. Nature and Circumstances of the Offense

Ms. Bronfman argues that a below-Guidelines, non-custodial sentence is appropriate because there are no aggravating factors, and because her actions were "never ill-intentioned." (*See* Def. Mem. at 38, 42.) The evidence suggests, however, that Ms. Bronfman's conduct underlying her conviction on Count One was particularly egregious because it was not only dishonest with respect to the United States government, but it was also dishonest and damaging with respect to the individuals whom she harbored.

Ms. Bronfman helped Jane Doe 12 to obtain a visa by representing that she would make $3,600 per month as a "management consultant" for the Nxivm-affiliated fitness company Exo/Eso. (Gov't Ex. A1-001.) Instead, Jane Doe 12 was barely compensated for her work. Her email correspondence with Ms. Bronfman shows that she repeatedly made Ms. Bronfman aware that Ms. Bronfman's failure to deliver on the terms of the employment agreement had left her in dire financial straits. In November 2015, for example, Jane Doe 12 emailed Ms. Bronfman that "[w]ith no money involved" it was "very difficult [for her] to support" herself and to "keep up the pace with no income and with the uncertainty of not knowing how I will live each day." (Gov't Ex. A1-009.) The following month, in December 2015, Jane Doe 12 emailed Ms. Bronfman that because Exo/Eso was not paying her the contractually specified wage she was owed, she needed to find another source of income "to support myself here." (Gov't Ex. A1-012.) Jane Doe 12's victim impact statement makes clear that she felt tremendous pressure from Ms. Bronfman, who led her to believe that she did not deserve the salary provided for in her employment letter because any business difficulties that Exo/Eso endured were attributable to Jane Doe 12's "personal issues." (PSR ¶ 114.) According to Jane Doe 12's statement, Ms. Bronfman, despite her financial means and earlier commitments to the contrary, explained that she "couldn't pay [her]" because she had failed to enroll enough participants in Exo/Eso to generate sufficient revenue. (*Id*.)

Ms. Bronfman also used Jane Doe 12's immigration status as a means of pressuring her to continue working without compensation. When Jane Doe 12 emailed Ms. Bronfman to ask if she could look for another job, Ms. Bronfman replied that it "would impact the work agreement" and cause possible visa issues. (Gov't Ex. A1-012.) Several months later, Ms. Bronfman emailed Jane Doe 12 that in order to "stay here" she needed to address "one fundamental question yet to be answered; what are you going to do to earn your visa?" (Gov't Ex. A1-020.)

Importantly, none of these facts are disputed. Ms. Bronfman does not contend that she provided Jane Doe 12 with adequate or consistent compensation or honored the terms of the employment agreement. Rather, she merely suggests that she was surprised to learn that Jane Doe 12 was unhappy with the circumstances of her employment, and that she thought their relationship was "caring" and a "friendship." (Def. Mem. at 39; *see also* Clare Bronfman Letter to Judge Garaufis ("Bronfman Letter to Court") (Dkt. 915-1) at ECF p. 1 (suggesting that she "never meant [to] hurt" Jane Doe 12 and "wanted to make her life better".) But her characterization is belied by Jane Doe 12's victim impact statement and by the email correspondence between Ms. Bronfman and Jane Doe 12. In short, I find by a preponderance of the evidence that Ms. Bronfman refused to honor the terms of Jane Doe 12's employment agreement, demanded work from Jane Doe 12 without compensation, and emotionally manipulated Jane Doe 12 into believing that her own personal failures and job performance—not Ms. Bronfman's refusal to pay her—were the cause of her precarious financial situation.

And all of this emotional and financial pressure came at a severe cost to the victim—a cost greater than the sum of its parts. Jane Doe 12 was eventually recruited into DOS, Raniere's secret society, in which she was pressured into giving up "collateral" and becoming a "slave." (PSR ¶ 114.) I am not suggesting that Ms. Bronfman had a direct role in Jane Doe 12's recruitment into DOS, or even that she was aware of it. The evidence before me does not support such a proposition. But I do find that the kind of pressure and mistreatment that Jane Doe 12 was subjected to by Ms. Bronfman put her in a very vulnerable state, the kind of state that could make a person more susceptible to being recruited into an organization like DOS.

Moreover, the evidence suggests that this kind of conduct was part of a pattern. Ms. Bronfman obtained a visa for another non-citizen so that she could supposedly earn $3,600 per month as a management consultant at Exo/Eso. (Gov't Exs. A2-002, 003.) Three months later, that woman emailed Ms. Bronfman to say that she had not been "prepared for no income." (Gov't Ex. A2-007.) Despite this individual's financial predicament, emails between her and Ms. Bronfman demonstrate that Ms. Bronfman's main concern was that the individual "go above and beyond" to pay her back—plus interest. (Gov't Ex. A2-009.) Ms. Bronfman helped obtain a visa for another non-citizen, a woman from India, and actually paid her a salary—but then required that the woman pay her back when the work responsibilities she was given were less than fulltime. (Gov't Mem. at 8 n.5.) Adrian, the brother of Jane Does 2, 3, and 4, submitted a victim impact statement in which he states that Ms. Bronfman "told me she was going to help me with my immigration problem . . . but she never did," and that she repeatedly talked him out of returning to Mexico but "made sure I never got my visa so that she would always have something to hold over my head." (PSR ¶ 114.)[3] And at least one other woman who worked for Ms. Bronfman, and who was in the United States pursuant to a visa that Ms. Bronfman helped to obtain, was recruited into DOS. (Raniere Trial Tr. ("Tr.") at 150, 207, 211-12.) As a DOS "slave," she was coerced into an unwanted and nonconsensual sexual relationship with Raniere. (*Id*. at 219-20, 250-57.)

What is clear to me, from all of this, is that Ms. Bronfman made promises to immigrants that she did not keep, exacted labor that she did not pay for, and took advantage of these individuals' financial straits and immigration statuses, in a manner that exacerbated both their financial and emotional vulnerabilities and made them more reliant on her and the Nxivm community, sometimes with very harmful consequences.

Ms. Bronfman's conviction on Count Two, for fraudulent use of identification, must also be considered in the context of her relationship to Raniere and his history and conduct. The charged conduct concerns

[3] Ms. Bronfman's sentencing submission suggests that she considered Adrian "akin to a younger brother." (Def. Mem. at 30.) Apparently, the feeling is not mutual.

Ms. Bronfman's use of credit card and bank account information belonging to a deceased individual who had been a close associate of hers and Raniere's. Over the fifteen months that followed this woman's death, Ms. Bronfman paid approximately $135,000 in bills charged to the deceased's credit card. (PSR ¶ 57; *see also* Tr. at 4540, 4556-64.) Additionally, approximately $320,205 in checks and $736,856 total disbursements were withdrawn from the deceased's account. (*Id.*; *see also* Tr. at 4582.) The Government suggests that this conduct was consistent with Raniere's habit of keeping expenses out of his name in an effort to avoid tax liability (*see* Gov't Mem. at 17, 44; PSR ¶ 57), while Ms. Bronfman characterizes her actions as a mere misunderstanding and a victimless crime, since the deceased had left the entirety of her estate to Raniere (*see* Def. Mem. at 40-41). She also suggests that her only involvement in the scheme was that her office handled bookkeeping for the deceased's accounts, and that her role was therefore minimal and indirect. (*Id*. at 40, 40 n.6.)

Ms. Bronfman denies that she engaged in any effort to intentionally help Raniere keep money out of his name. (Def. Reply at 18.) I agree with her that the preponderance of the evidence available to me does not suggest what her specific intentions were in authorizing expenditures of a deceased woman's money. But I do find, by a preponderance of the evidence, that the facts underlying this offense are consistent with a pattern of facts suggesting that Raniere attempted to minimize money that was in his name. (*See, e.g.,* Gov't Mem. at 44; Tr. at 608, 1449-54.) And I find, by a preponderance of the evidence, that Ms. Bronfman's *conduct* in committing this offense helped to facilitate those efforts on Raniere's part, regardless of whether or not that is what Ms. Bronfman understood herself to be doing. This crime, like the crime in Count One, was committed within a larger context of more serious crimes and alarming behavior by Ms. Bronfman's co-defendants and was consistent with the hallmarks and aims of that behavior. That does not necessarily mean that Ms. Bronfman shared in those aims, but it is still relevant context, and I can and do take it into consideration.

2. History and Characteristics

Ms. Bronfman is a person of considerable privilege and wealth; so much so, in fact, that she was able to give Nxivm and other Raniere-associated endeavors more than $100,000,000. (*See* Def. Mem at 67-68.) There is nothing wrong with being wealthy, of course. But I am troubled by evidence suggesting that Ms. Bronfman repeatedly and consistently leveraged her wealth and social status as a means of intimidating, controlling, and punishing individuals whom Raniere perceived as his adversaries, particularly Nxivm's detractors and critics. For example, in a 2008 email to Stephen Herbits, a friend of Ms. Bronfman's father whom she believed to have political connections, Ms. Bronfman inquired whether criminal indictments could be brought against Nxvim critic Rick Ross. She wrote that the "'Ross camp' needs to be fearful, back down and look to fix the[] damage they have done" and that "the thought of criminal charges may help inspire this." (Dec. 4, 2008 Bronfman Email (Dkt. 922-2) at ECF p. 5.) In a separate email, she indicated that she hoped Mr. Herbits would "rapidly facilitate" Mr. Ross's indictment and conviction. (Nov. 11, 2008 Bronfman Email (Dkt. 922-2) at ECF p. 2.) Mr. Herbits testified at Raniere's trial that Ms. Bronfman also asked him to contact the Attorneys General of New York and New Jersey to request that they prosecute Mr. Ross. (Tr. at 1330-32.)

Furthermore, Ms. Bronfman's efforts to intimidate and silence Nxivm's critics were not limited to its prominent and powerful detractors. In 2017, for example, she emailed a Mexican lawyer photographs of three of Raniere's former partners along with descriptors that seem to be aimed at facilitating the former partners' contemporaneous identification. (May 9, 2017 Bronfman Emails (Dkt. 922-2) at ECF pp. 13-15.) According to the Government, all three of these women had become vocal critics of Raniere. (Gov't Mem. at 53.) It is not clear from the record why Ms. Bronfman wanted this lawyer to be able to visually identify these women, but it is hard to imagine an innocuous explanation. Numerous victim impact statements from other individuals corroborate the fact that Ms. Bronfman was forceful and aggressive in her efforts to use the legal system to silence Nxivm's critics. One woman wrote that Ms. Bronfman and Raniere "put a lot of pressure on [her] to sue [her] mother because she was publicly speaking out about [Nxivm] and they wanted to silence her." (*Id*. at 54.) The parents of a young woman whom Nxivm sued for publishing its course materials online wrote that it is "not possible to overstate" the significance of Ms. Bronfman's financial support for the litigation against their daughter, calling her "the very fuel that powered the [Nxivm] engine of vengeance and cruelty." (*Id*.)

It was one thing to believe in Nxivm's mission and methods, and to adhere to its teachings. As Ms. Bronfman points out, she was far from alone in that respect. (Def. Mem. at 19.) But the record is clear that she used her incredible wealth and attempted to use her social status and connections not only to support Nxivm's work, but also as a means of intimidating, threatening, and exacting revenge upon individuals who dared to challenge its dogma. This culture of stifling and threatening dissenters, a culture that Ms. Bronfman clearly participated in and perpetuated, is the same culture that gave rise to the darkest and most horrific crimes that Raniere and others committed. This was one of the mechanisms by which Raniere exerted and retained power over his victims, and even if Ms. Bronfman did not knowingly facilitate Raniere's worst crimes, as a general matter she was his accomplice in the effort to intimidate and silence detractors, using her wealth and privilege as a sword on Raniere and Nxivm's behalf.

Ms. Bronfman's comfort with using her wealth and status to attack perceived enemies is evidenced in further ways. The first involves her role in hacking into the computer of her father, Edgar Bronfman. In October 2003, Forbes Magazine published an article in which Mr. Bronfman was quoted as calling Nxivm a "cult." From that point on, Raniere reportedly considered Mr. Bronfman to be on "the enemy side." (Tr. at 2549-50.) As a result, Raniere told Jane Doe 4 that it would be good to gain access to Mr. Bronfman's email. (*Id.* at 2550.) Initially, the plan to access Mr. Bronfman's emails was that Ms. Bronfman, given her relationship with her father, would send him email messages containing a link to software that, when opened, would infect his computer and provide Jane Doe 4 access to his emails. (*Id.* at 2552-53.) Jane Doe 4 testified that she handed Ms. Bronfman a USB with a file on it that she would then send to her father as an attachment. (*Id.* at 2553.) Ms. Bronfman sent multiple emails with the attachment to her father; but the plan was stymied because, for whatever reason, Mr. Bronfman did not open the emails. (*Id.* at 2554.) To overcome this obstacle, Ms. Bronfman ended up physically plugging a USB drive given to her by Jane Doe 4 into her father's computer, clicking on the necessary software, and infecting the computer locally. (*Id.*) Ms. Bronfman was successful, and Jane Doe 4 was able to monitor Mr. Bronfman's email, which she did "regularly, mostly at the request" of Raniere. (*Id*. at 2556.) Ms. Bronfman's attempts to downplay this incident as an "unproven" and a mere "family dispute" notwithstanding (*see* Def. Mem. at 65), I find that Jane Doe 4's testimony credibly establishes Ms. Bronfman's role in this scheme by a preponderance of the evidence. And I am troubled by Ms. Bronfman's dismissive characterization of this incident as a "family dispute." This is serious conduct, and it became more than a "family dispute" the moment that Ms. Bronfman gave access to her father's email account to individuals who were outside of the family, and who in fact considered her father to be an "enemy."

Ms. Bronfman was not finished helping Raniere spy on his perceived enemies. According to the testimony of FBI Special Agent Michael Weniger, Ms. Bronfman paid "upwards of $400,000" to a Canadian company called Canaprobe to spy on Raniere's enemies, including Rick Ross. (Tr. at 5013; *see also id.* at 5014 (evidence of Mar. 3, 2009 Canaprobe invoice with subject listed as "Rick Ross" and customer listed as "Clare Bronfman").) In the face of this testimony, Ms. Bronfman now argues that she was "led to believe that Canaprobe's work was legal," because, *inter alia*, "Canada had different laws than the United

States." (*See* Def. Mem. at 65.) While I find it difficult to imagine that Ms. Bronfman thought that this kind of surveillance would be legal in Canada but not the United States, that debate is purely academic. Ms. Bronfman concedes that she was aware that Canaprobe specialized in "tracking global asset movement and concealment" (Def. Mem. at 66), and the testimony of Special Agent Weniger, supported by substantial documentary proof, establishes by a preponderance that Ms. Bronfman spent hundreds of thousands of dollars on Canaprobe's services in an attempt to gain information about Raniere's so-called enemies. I find this behavior to be yet another example of a consistent theme for Ms. Bronfman: at every turn, she was a willing partner to Raniere in his efforts to intimidate and silence perceived enemies or threats.

Perhaps the most troubling example of this theme concerns Ms. Bronfman's actions once she was confronted with information about DOS. Ms. Bronfman is adamant that DOS was a secret society that she "neither participated in nor knew anything about." (*See* Def. Mem. at 2; *see also id.* at 20 (distinguishing things Ms. Bronfman financed such as "patents, commodities, and a few loans," from DOS, which she did not finance); Def. Reply at 4 ("Clare Bronfman did not know about DOS, had nothing to do with DOS, and did not fund DOS.").) To be clear, the fact that some "commodities," a "few loans" and "patents" translated to Ms. Bronfman giving Raniere and Raniere-associated endeavors more than $100,000,000 suggests, yet again, an almost unshakeable commitment to Raniere on the part of Ms. Bronfman. Yet, I discuss DOS not because the evidence establishes, for example, that Ms. Bronfman funded specific DOS activities or even knew about specific DOS rituals in real time. I do not find that the Government has proven by a preponderance of the evidence that Ms. Bronfman knowingly funded particular criminal activities. I do not find that Ms. Bronfman knowingly funded a sex cult.

There is ample evidence, however, that as Ms. Bronfman was confronted with information about DOS, and therefore necessarily became aware of it, she doubled down on her support of Raniere and pursued her now-familiar practice of attacking his critics.

In June 2017, the existence of DOS started to become known within the larger Nxivm community when the husband of Sarah Edmondson, a DOS "slave," publicly confronted a DOS First Line member, Lauren Salzman, about the cult. Subsequently, Ms. Salzman began to receive requests from DOS slaves—many of whom were longtime Nxivm members whom Ms. Bronfman knew—that their collateral be returned to them. (Tr. at 1805). When asked what she did when she received those requests, Ms. Salzman testified that "I forwarded them to Clare" because "Clare was heading up our legal initiatives." (*Id.*) One such email from a DOS victim that Salzman forwarded to Ms. Bronfman began as follows: "I am requesting the immediate return and/or destruction of the 'collateral' I provided to you, as well as the nude photographs and videos of me that were produced within DOS under your direction." It continued: "[M]y participation in DOS, and all material provided or created during that time, was based on false information you gave me." It concluded, "I don't want to worry about my collateral being exposed and I absolutely have that right." (*See* Gov't Mem. at 22-23.)

Ms. Bronfman protests what she considers to be the Government's assertion that her receipt of these emails imputes to her foreknowledge of DOS's activities.[4] That is not what I find to be true, and I do not base Ms. Bronfman's sentence on the assumption that she knew about DOS prior to receiving these emails. What it does impute,

[4] Ms. Bronfman also argues that these letters were also sent to the rest of the Nxivm board, as well as other members of Nxivm. (Def. Reply at 14.) For one thing, Ms. Salzman testified that she specifically forwarded the email she received from a DOS victim asking for her collateral back to Ms. Bronfman. For another, the fact that the emails were sent to other people has no bearing on the fact that Ms. Bronfman was in receipt of an email from a woman referencing collateral of nude photographs and videos that had been extracted from her, expressing fear that this collateral would be exposed.

however, and what I do consider relevant, is Ms. Bronfman's awareness, in that moment, of DOS victims urgently reaching out to recover their "collateral"—including, as Ms. Bronfman now knew, nude photographs and videos—and expressing obvious fear that this collateral would be exposed. With this knowledge, Ms. Bronfman could have begun to distance herself from Raniere and attempt to help those who were clearly in need. Instead, she chose to double-down on her support for Raniere, even helping to facilitate further intimidation of DOS victims. For example, shortly after learning that the New York Times would be publishing an article about DOS in September 2017, Raniere sent an email to Ms. Bronfman with the subject line "What are your thoughts" containing a draft of a threatening letter to be sent to DOS victims. (Sept. 13, 2017 Raniere Email (Dkt. 922-1) at ECF p. 2) The letter that Raniere wanted Ms. Bronfman's thoughts on is worth reading in full:

> Ms. [DOS victim],
>
> I am the chief attorney of a criminal investigation in Mexico of more than 20 individuals tied together in a cooperative destructive network. These individuals, including yourself, have been acting against individuals who participate in the NXIVM corporation community.
>
> You are currently connected to several criminal investigations involving fraud, coercion, extortion, harassment, stalking, theft, larceny, hate crime, criminal conspiracy, breaking and entering, computer crimes, wire fraud, criminal enterprise, and corporate espionage.
>
> I strongly suggest that you cease and desist, undo, reverse, cancel, and retract, participation in all past, present, and future, conversations, conference calls, meetings, news media, social media, blogs, or websites, relating to this subject matter until the criminal matters are resolved. You should do everything in your power to affect this.

> Your best course of action to minimize your exposure, in addition to the above, is to repair all damages to parties you have acted against, reconciling with them, and fully cooperating with the criminal investigations. In this regard, I can help you for I represent some of your victims and have access to others.
>
> I know that people in the media (and also bloggers and the like) can be coercive, abusive in their power, and force unwitting, uninformed, participants to complicate situations and potentially even waive rights. You still have the ability to pull away from all participation with these people.
>
> Please contact me as soon as possible,

(*Id.*) Less than thirty minutes later, Ms. Bronfman emailed the text of the email to an associate in Mexico. (Sept. 13, 2017 Bronfman Email (Dkt. 922-1) at ECF p. 3.) The next day, the DOS victim referenced in the draft email received an email from a Mexican attorney, Ricardo Olmedo, with an attachment of a Microsoft Word document containing, nearly word-for-word, the text of the email sent by Raniere to Ms. Bronfman. (Sept. 14, 2017 Olmedo Letter (Dkt. 922-1) at ECF p. 4.) Metadata of the Word document received by the DOS victim reflects that the creator of the document was Ms. Bronfman. (Gov't Mem. at 24.) Raniere sent further drafts of threatening emails to Bronfman, who passed them along to Mr. Olmedo, who sent them to DOS victims. (*See* Sept. 18, 2017 Raniere Email (Dkt. 922-1) at ECF p. 5 (draft of email to a DOS victim sent from Raniere to Bronfman threatening that "[t]he criminal investigations will increase in number, and thoroughness, and will not stop until justice is served. This will not go away").)

In other words, here we have Ms. Bronfman, in September 2017, working hand-in-hand with Raniere to intimidate and silence victims of Raniere's brutal campaign of sexual abuse and exploitation. I frankly find Ms. Bronfman's explanation of this behavior deeply disingenuous. Ms. Bronfman argues that she was "informed individuals associated with a [Nxivm] Mexico company were being called, scared and persuaded to leave [Nxivm]." (Def. Mem. at 23.) As a result, and supposedly out of a magnanimous sense of duty to people who were reliant on Nxivm for their income, and whose livelihoods might be put at risk if Nxivm members were talked into leaving, Ms. Bronfman explains that she "sought legal counsel to help stop what [she was] told was criminal behavior based in Mexican law," and "together with [Nxivm] Mexico lawyers. . . aggressively tried to stop the damage." (*Id.*) Such an argument flies in the face of the facts: Raniere specifically sought out Ms. Bronfman to review and forward his threatening letters, which she then ensured were sent to Raniere's victims—she cannot now seek to pawn off the entire chain of events on counsel. Ms. Bronfman further avers that she merely engaged counsel in Mexico out of a concern that Nxivm's client list was being misused. (Def. Reply at 14-15.) That suggestion is belied by the language of the letter, which is plainly written in a manner designed to threaten its recipient. In lieu of any mention of the Nxivm client list, the letter accuses its recipient of being "connected to several criminal investigations involving fraud, coercion, extortion, harassment, stalking, theft, larceny, hate crime, criminal conspiracy, breaking and entering, computer crimes, wire fraud, criminal enterprise, and corporate espionage."(Sept. 13, 2017 Raniere Email at ECF p. 2.) That is a threat.

And, not surprisingly, recipients of these emails felt threatened. One DOS victim who received a threatening letter writes the court that "[w]ords cannot describe" the experience of receiving a "threatening letter from a lawyer in Mexico that basically warned me that I better keep my mouth shut about DOS or I would suffer the consequences." (Gov't Mem. at 49.) Another DOS victim who received such a letter writes that the letter represented an "underhanded intimidation tactic to scare me into remaining silent." (*Id.*) The victim's statement continues, "[w]hen I was at my most vulnerable, Clare Bronfman traumatized me." (*Id.*)

The trend continued for Ms. Bronfman. In December 2017, Ms. Bronfman issued a public statement in which she falsely characterized DOS as a "sorority" that "truly benefited the lives of its members, and does so freely." (Bronfman Stmt. (Dkt 922-1) at ECF p 12.) Ms. Bronfman is adamant that at the time she made this statement, "she was acting with limited information," and that she "did not understand the full scope of DOS until Keith Raniere's trial." (Def. Reply at 15.) What Ms. Bronfman did know at the time, however, was that DOS victims were reaching out to Lauren Salzman asking for their "collateral" of nude photographs and videos to be returned. She knew that Raniere had sent threatening letters to DOS victims—letters she helped draft and send. She knew that in October of 2017, the New York Times published an expose on DOS, in which, for example, former DOS "slave" Sarah Edmondson describes getting branded and saying, as instructed, "Master, please brand me, it would be an honor."[5] Yet, Ms. Bronfman was too concerned with, as she put it in her December 2017 statement, the potential "tragedy" of losing the "innovative and transformational ideas and tools" of Nxivm to acknowledge the horrors that had occurred within the community to which she both belonged and helped lead, or to take action on behalf of those who had been badly hurt. (Bronfman Stmt.) To the contrary, she acted against their interests and in defense of Raniere—yet again—by seeking to have criminal charges brought against Ms. Edmondson in Vancouver. (Gov't Mem. at 23.) She subsequently travelled to Mexico to live with Raniere, during which time Raniere invited First Line DOS members to participate in a "recommitment ceremony." (PSR ¶¶ 102-103.) And, after Raniere's arrest, Bronfman funded his legal defense—including an initial deposit of approximately $5,000,000 to the fund from which her co-defendants' legal fees were paid. (Gov't Mem. at 27.) To date, Ms.

[5] Barry Meier, *Inside a Secretive Group Where Women Are Branded*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/nyregion/nxivm-women-branded-albany.html?searchResultPosition=3

Bronfman has contributed $13,800,000 to an irrevocable trust created to pay the legal fees of Raniere and other co-defendants. (PSR. ¶ 190.)

I find this behavior indicative of Ms. Bronfman's allegiance to Raniere—whatever the cost, whomever it hurt—and highly relevant to the application of the § 3553(a) factors to Ms. Bronfman's sentence. Ms. Bronfman came to learn details about DOS and faced a choice as to whose interests she would protect: Raniere's or his victims'. She chose Raniere unequivocally, and to this day she has not clearly apologized for that choice, admitted that her actions were harmful, or conceded that her loyalty was misplaced.

Ms. Bronfman repeatedly argues that she knew nothing about, and never funded, DOS. As I said earlier, I do not base my sentence on a finding that contradicts either of those claims. However, I do find it relevant that Ms. Bronfman seems to have a pattern of willful blindness when it comes to Raniere and his activities. As Lauren Salzman testified, Ms. Bronfman "didn't want to know anything [about DOS] that she didn't need to know." (Tr. at 1863-64.) I find that testimony particularly credible because it would not be the first time that Ms. Bronfman exuded the sense that she wanted to participate in Raniere's world while remaining unaware of its uglier aspects. For example, when she tried to get Stephen Herbits to convince authorities to bring criminal charges against Raniere-enemy Rick Ross, Bronfman told Herbits, "I don't need to know who is funding [the efforts], how you stop that from continuing, *in fact I don't want to know*—it just needs to be done, and quickly." (Dec. 4, 2008 Bronfman Email) (emphasis added).

I also find it relevant that Ms. Bronfman's allegiance to Raniere shines through again and again. She has paid his legal fees and, to this day, maintains that he "greatly changed [her] life for the better." (Bronfman Letter to Court at ECF p. 2.) That is consistent with both her actions, as described above, and what others have said about her. (*See, e.g.,* Tr. at 1863 (testimony of Lauren Salzman that Ms. Bronfman was "incredibly

Case 1:18-cr-00204-NGG-VMS Document 932-1 Filed 09/30/20 Page 86 of 90 PageID #: 16379

loyal" and "incredibly dedicated" to Raniere).) Raniere and his adherents appear to understand Ms. Bronfman's continued loyalty—even after his trial and conviction, during which all the details of his sexual abuse and exploitation became known to the world. For example, in a post-conviction call between Raniere and Jane Doe 3, Jane Doe 3 reported that Ms. Bronfman is "very good with you," to which Raniere responded, "I don't think her view of me has changed at all. If anything it's gotten stronger." (Gov't Mem. at 57-58.) Later in the conversation, when discussing whether Jane Doe 3 could share with Ms. Bronfman an op-ed about DOS authored by Raniere, Raniere explained, "Yeah, oh, absolutely. Yeah. Anything with Clare." (*Id*. at 58.) Raniere's view that Ms. Bronfman remains loyal to him to this day only buttresses my conclusion that Ms. Bronfman was concerned, first and foremost, with protecting Raniere and attacking his enemies. That she personally feels like Raniere changed her life for the better is beside the point. And while she might not have known about DOS before receiving the collateral emails in September 2017, I find it clear that, in her own words, she did not want to know, either.

3. Additional Factors

In determining an appropriate sentence**,** I also consider the need for the sentence that I impose to reflect the seriousness of the offense, promote respect for the law, and provide just punishment. As I have mentioned, the offenses of conviction, particularly on Count One, were more serious here than those crimes might ordinarily be under other circumstances. The immigration-related offense is serious because Ms. Bronfman's dishonesty and misrepresentations were harmful not only to the federal government, but to the immigrants like Jane Doe 12 who were taken advantage of and put in a position of having to work for little or no pay. Likewise, Ms. Bronfman's conduct with respect to Count Two had the effect of facilitating Raniere's efforts to keep money out of his name. In terms of promoting respect for the law, I am mindful of Ms. Bronfman's history of seeking to manipulate the legal system to her advantage, both in her execution of the offenses of conviction and, for example, by seeking to leverage her social connections to have criminal charges brought against Raniere's critics. This is not a defendant who has shown great respect for the law, and a just punishment must take that into account.

I also need to consider the extent to which the sentence will operate as a deterrent. Ms. Bronfman's circumstances are rather unique: I don't know how many other multimillionaires are out there, ready to devote the limitless resources at their disposal to supporting pyramid schemes run by dangerous criminals and stifling the voices of their critics and victims. But in another sense, her circumstances are not so unique. She maintains that she was an innocent bystander to Raniere's abhorrent conduct, completely blind to Raniere's crimes and the sex trafficking that occurred within the Nxvim community. As I have said, I find that any such blindness was willful and cultivated, and Ms. Bronfman's sentence can and should serve to deter other people who find themselves in situations in which they can choose to either confront or avert their gaze from the harm wrought by their actions and the actions of those to whom they are close.

I also need to consider whether the sentence will protect the public from further crimes committed by Ms. Bronfman. I believe that Ms. Bronfman has been chastened by this experience, and she has expressed remorse for the crimes to which she has pleaded guilty. I don't doubt her sincerity. It does, however, concern me that she continues to stand by Raniere and believe in his work, even as he stands convicted of truly heinous conduct. Nonetheless, I don't expect her to commit further crimes of this nature, regardless of the sentence I impose.

I have considered the range of sentences that are available and the range suggested by the Sentencing Guidelines. There is no mandatory minimum sentence for the offenses of conviction, and Ms. Bronfman requests a non-custodial sentence. I have considered that possibility, but given the nature and circumstances of the offenses and the context in which they were committed, my view is that a non-custodial sentence would be insufficient. I have considered sentences that are below the Guidelines range and sentences that are within that range. And I have considered sentences that are above that range, up to and including the statutory maximums of 10 years on Count One and 15 years on Count Two. *See* 8 U.S.C. § 1324(a)(1)(B)(i); 18 U.S.C. § 1028(b)(1)(D). Because these sentences may be imposed either concurrently or consecutively, the combined statutory maximum I can sentence Ms. Bronfman to is 25 years. *See* 18 U.S.C. § 3584(a).

I have considered the need to avoid unwarranted sentence disparities between Ms. Bronfman and other defendants who have been convicted of similar conduct. But I find, for the reasons I have explained, that the context of Ms. Bronfman's criminal conduct places her in an altogether different category from other defendants who are convicted of the same offenses, and therefore her circumstances defy easy comparison. I have also considered the threat that COVID-19 poses to incarcerated persons and the humanitarian need to minimize our prison populations in light of the pandemic. Neither Ms. Bronfman's age nor health condition, however, place her in the category of high-risk individuals, and I find that her conduct warrants a custodial sentence even during the pandemic.

Finally, I have also considered the appropriateness of imposing a fine, as I am obligated to do subject to 18 U.S.C. § 3571, unless I find that Ms. Bronfman is unable to pay. Section 3571(b) permits me to impose a fine on each count of up to $250,000, for a total of $500,000. In addition to the factors I have noted already, § 3572(a) sets out additional factors that I must consider in determining whether to impose a fine and, if I do, what the amount should be. These factors include Ms. Bronfman's ability to pay and the financial burden that a fine will impose on her or anyone else. They also include the expected cost to the Government of her sentence. The Guidelines fine range for Ms. Bronfman's offenses is between $10,000 and $95,000. (*See* U.S.S.G. § 5E1.2(c)(3); *see also* PSR ¶ 202.) Ms. Bronfman points out that I may not impose an excessive fine as punishment, and that I should not increase her fine above the suggested range simply on the basis of her ability to pay. (*See* Def. Reply at 21-22.)

In light of Ms. Bronfman's wealth, there is no question that she can afford to pay any fine that I might impose, up to and including the statutory maximum. As I have already explained, I find that the seriousness of her offenses, viewed in the context of her other conduct and the conduct of her co-defendants to whom she remains loyal, justifies a serious sentence. As one aspect of that sentence, I am imposing the statutory maximum fine of $500,000. I select this fine amount not because Ms. Bronfman is wealthy, but because I believe that the nature and seriousness of her conduct warrants such a substantial fine, and because I find that her personal financial circumstances do not preclude me from imposing it.

C. Conclusion

In determining an appropriate sentence, I am guided by the Second Circuit's instruction that I use the Guidelines "as an initial benchmark, and then make an informed and individualized sentencing determination, taking into account all the statutory factors." *United States v. Glass*, 770 F. App'x 584, 587 (citing *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc)). Applying the statutory factors to this case, I find that a substantial upward variance is appropriate. As the foregoing has made clear, I find that the nature and circumstances of Ms. Bronfman's offenses exacted a harm not reflected in the Guidelines and placed her conduct outside the ordinary realm for these offenses. I also find that a fair appreciation of her history and characteristics—including her repeated attempts to leverage her wealth and status as a sword against Raniere's enemies and her decision, as she became aware of DOS, to remain steadfast in her support of Raniere—lead to the conclusion that a sentence greater than the upper limit of the Guidelines is warranted. The remaining statutory factors likewise reflect the need for an above-Guidelines sentence in this case.

I therefore sentence Ms. Bronfman as follows: a prison sentence of 81 months, which is three times the high end of the Guidelines range and which takes into account the severity of Ms. Bronfman's illegal behavior; a fine in the amount of $500,000, the statutory maximum, payable immediately; a $200 Special Assessment, also due immediately; three years of post-incarceration supervised release on each count, to be served concurrently; and restitution of $96,605.25 to Jane Doe 12 on Count One. Finally, I also enter a forfeiture money judgment of $6,000,000—which Ms. Bronfman consented to in her plea agreement—payable within 30 days.

SO ORDERED.

Dated: Brooklyn, New York
September 30, 2020

/s/ Nicholas G. Garaufis
NICHOLAS G. GARAUFIS
United States District Judge